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EXECUTIVE COMMITTEE ISSUE

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Purpose

The purpose of this Association shall be to bring into closer contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, who are actively engaged wholly or in (substantial) part in the practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

ACTIVITIES

I am pleased to inform our members that the Association is making steady progress in enlarging its field of usefulness.

One of the main objects and purposes of this Association is to help the cause of insurance and insurance companies. To further that purpose, the Executive Committee at its last meeting, by unanimous vote, directed me to tender the services of our organization to the Association of Casualty and Surety Executives and the American Mutual Alliance. That has been done. This Association also tenders its services to any other insurance organizations or the representatives of any branch of insurance that may need its help.

At the request of the Unfair Practices of the Law Committee of the American Bar Association, Mr. Caverly, Mr. Crawford and I attended a round table meeting recently in Detroit to consider the vexing question of lay adjusters. At that meeting it was decided to organize an advisory committee of nine members, each representing one of nine large national organizations interested in this question, including our Association, to collaborate with the American Bar Committee in the preparation of a practical, common sense code of ethics governing the activities of lay adjusters. Mr. Raymond N. Caverly has been appointed as the representative of this Association on that committee. I am very hopeful that this perplexing problem will be solved in the near future.

* * *

MEMBERSHIP

While we have a fine representative membership and are steadily receiving new applications; yet there are many fully qualified insurance lawyers who do not, but who should, belong to our organization. Each of our members should make it his business to secure applications from his friends and acquaintances who have the proper qualifications for membership under our by-laws.

* * *

CONVENTION

Don't forget the Convention commencing August 31st, at the Grand Hotel, Mackinac Island. You can arrange to take your vacation at that place as the special rates quoted are available as long before and as long after the Convention date as you may desire. Make your reservations early.

* * *

CONVENTION PROGRAM

A program for the Convention is being prepared. Suggestions will be welcome. If any of you have an interesting paper prepared or will volunteer to prepare one, please advise me at once.

I am looking forward to the pleasure of seeing you all at Mackinac Island the last week in August.

Insurance Counsel Journal

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MACKINAC IN AUGUST

ROOSEVELT the First used to contend, with good point, that it was the duty of every man, whether in business or profession, to take active part in association work, and to attend the meetings of his fellows. He claimed, and rightly, that each man owed this much to his calling.

The International Association of Insurance Counsel will hold its annual convention at Mackinac Island, Michigan. The meeting gives an occasion for the renewal of friendships and the making of new ones, all in a setting as delightful as may be found in this country.

* * *

PROPOSED AMENDMENTS TO THE BY-LAWS

The Executive Commitee, at their mid-winter meeting, approved and recommended to the membership that:

Article III of the by-laws be amended to read as follows:

"Any person who is a member of the bar of the court of last resort of a state or territory of the United States of America or other province, country or territory of North America, including the West Indian Islands, and is actively engaged in the practice of law in the United States of America or other province, country or territory of North America, including the West Indian Islands, is of high professional standing, and who devotes a substantial portion of his professional work to the service of insurance companies shall be eligible to membership in this Association, upon recommendation in accordance with these by-laws."

Article XII, Section 1 of the by-laws be amended to read as follows:

"The following committees shall be appointed annually by the President, each to consist of not more than five members, to serve for the year ensuing and until their respective successors shall be appointed.

On Health and Accident Insurance.

On Casualty Insurance.

On Fidelity and Surety Law.

On Fire and Marine Insurance.

On Life Insurance.

On Workmen's Compensation and Unemployment Insurance.

A Reception and Entertainment Committee.

In addition to the aforesaid Committees the President shall appoint such special committees as the Executive Committee may authorize, or as he, the President, may deem useful, to serve for one year ensuing and until their successors shall be appointed, and to perform such duties as the Executive Committee may prescribe."

* * *

CORRECTED LISTING OF THE LEGISLATIVE AND MEMBERSHIP COMMITTEES FOR MICHIGAN

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The Value and Availability of War Risk Decisions in the Defense of Disability Litigation

By R. W. SHACKLEFORD
Tampa, Florida

THE numerous decisions dealing with the question of total disability under war risk policies have recently become vastly more significant in the defense of litigation arising under private contracts, by reason of the availability of Federal Declaratory Judgment Act, provided the principles in such cases are applicable.

In determining this question, we may well first consider the converse. The Fifth Circuit in *United States v. Cox,* 24 F. (2d) 944, made the following observation:

> "Cases dealing with ordinary contracts of insurance are generally not applicable when considering policies of war risk insurance. A policy of war risk insurance is more or less a gratuity from the Government, and was so designed to be. The United States assumed all of the extraordinary risks of war, and issued for the minimum premium what might be termed combined accident and life insurance policies, largely in return for the sacrifice to be made by the men of the United States in defense of their country. These policies and the law generally are entitled to the more liberal construction in favor of a soldier".

However, in a subsequent decision we find that the same court, apparently modified its prior view. We quote from *United States v. Martin,* 54 F. (2nd) 554:

> "As to the influence of the supposed benevolent purpose of Congress in producing liberality of construction for these war risk contracts, apart from the consideration that courts sit to interpret the law and not to administer benevolence *(U. S. v. LeDuc* (C. C. A.) 48 F. (2d) 789; *U. S. v. McPhee* (C. C. A.) 31 F. (2d) 243, 245) a comparison of decisions construing war risk with those construing private disability policies will show very little, if any, difference in liberality of view. It will show that both are construed to reasonably and fully give effect to the purpose of the insurance to provide support to the extent of the policy payments, for those who are prevented by the disability insured against, from earning it for themselves".[1]

Of course, we are here concerned with the above problem only insofar as the reasoning employed may be pertinent to the question under consideration. It may be said that the very liberality of construction mentioned in the Cox decision should occasion statements favorable to the insurer to be applicable to private contract cases.

There appears to be but little direct judicial opinion on the question.

The Fifth Circuit in Met. Life Ins. Co. v. Foster, 67 F. (2d) 264, said:

> "The decisions on war risk insurance relate to the definition of total disability which was made by a regulation of the Secretary of the Treasury a term of the contract, and are of little relevancy here".

However, an analysis of the opinion would seem to clearly indicate that the above observation was limited solely to the specific question under consideration, i.e., the construction of the coverage extended, whether the insured's disability was to be measured by his prior occupation contrary to the terms of the policy. Such conclusion is necessitated by the fact that the same court in three subsequent cases, involving commercial contracts, has cited war risk decisions with approval.[2]

The following text announcements would seem to be equally applicable to the converse:

> 2 Cooley (2d Ed.) page 970:
> "The War Risk Insurance Act. (U. S. Comp. St. Section 514a et seq.) in its insur-

[1] In Miller v. U. S., 71 F. (2d) 361 (5th CCA) the court said: "We so held, in reference to a commercial policy of insurance in Met. Life Ins. Co. v. Foster, etc." And see Boyett v. U. S., 86 F. (2d) 66 (5th CCA).

[2] See: Halleck v. Hartford A. & Ind. Co., 75 F. (2d) 800; Mut. Life Ins. Co. v. Treadwell, 79 F. (2d) 487; Eq. Life Assur. Soc. v. MacKirgan, 86 (2d) 271.

ance feature was intended to afford the soldier the advantage of the ordinary life and accident insurance, which was no longer reasonably available to him, and, being a substitute for such insurance, the government contracts are to be construed by the same rules as like contracts involving none but private parties (Law v. United States (D. C.) 290 F. 972)".

1 Couch page 76:

"However, even the governmental insurance does partake somewhat of the nature of private insurance contracts, and many of the established principles of law in reference to such contracts may be applicable thereto, but only in so far as they do not cause conflict with the creative source, namely, the statute and its amendatory regulations".[3]

The holding of the Supreme Court in *Lyrick v. U. S.*, 78 L. Ed. 1434, would appear decisive:

"When the United States enters into contract relations its rights and duties therein are governed generally by the law applicable to contracts between private individuals".

The Eighth Circuit cited the above case in support of the following terse statement:

"A war risk policy has all the legal qualities and characteristics of any other contract".

See *Cockrell v. U. S.*, 74 F. (2d) 151.[4]

Indeed, no sound reason can be advanced as to why statements of *general* principles and rules of construction should be inapplicable merely because they were made in a case wherein the government was the insurer rather than a private party. A contrary contention is fully answered by the fact of the repeated citation of war risk cases in actions wherein recovery is sought for disability benefits under commercial contracts, by various courts, both State and Federal.

Care should be taken, in order to determine the applicability of stated principles to determine that they are not affected by an established administrative construction. (See *Boyett v. U. S.*, 86 F. (2d) 66 (5th CCA).

[3]See statement in U. S. v. Clapp, 63 F. (2d) 793 (2nd CCA).

[4]See Mikell v. U. S., 64 F. (2d) 301 (4th CCA) and U. S. v. Pulley, 63 F. (2d) 379 (8th CCA).

Further, certain announcements, particularly those which are favorable to the insured, should be analyzed in the light of the general rule that war risk policies are to be liberally construed and all doubts resolved in favor of the insured. Of course, the difference in the terms of the policies makes certain statements either entirely inapplicable or distinguishable.

The occasion for urging research into the war risk decisions is four-fold:

First. Principles are therein found which are either not stated in the cases construing private contracts or on which there is a paucity or authority.

Second. There are but a very limited number of Federal decisions dealing with disability questions flowing from private contracts and the precedent value of war risk announcements is much greater than are those from the state court decisions. An exhaustive research will generally enable you to present to your District Judge a war risk decision from your Circuit Court of Appeals squarely on your point, the value of which needs no enlargement at my hands. Further, there are several very exhaustive opinions by the United States Supreme Court wherein are to be found statements which are particularly beneficial from the defense angle.

Third. The war risk cases are invaluable in support of a contention that the insured has failed, as a matter of law, to establish total disability. Of course, it is true that the Federal holdings on this point are depreciated in those state jurisdictions which do not follow the Federal Courts in refuting the scintilla doctrine. Nevertheless, if you burn sufficient midnight electricity you can usually locate a case factually in point, wherein a directed verdict has been entered for the government, which may turn the tide of legal justice in your client's favor.

Fourth. A further benefit to be derived from a review of the war risk case opinions is that you will generally find some discussion which will prove decidedly helpful in the preparation and handling of your case from the medical as well as the legal angle. Not infrequently you will stumble upon a legal peg on which to hang a defense which will occasion consternation in the enemy's camp, particularly if the insured is a malingerer, and enable you to consummate a most satisfactory settlement of an otherwise hopeless case.

Illustrative of the valuable announcements to be found are the following:

(a) The curative treatment doctrine whereunder recovery may not be had for a disability occasioned or prolonged by the insured's failure to pursue a proper course of treatment, reasonable in its nature, to effectuate a cure.[5]

(b) The kindred proposition that neither expressly nor impliedly is self-inflicted disability within coverage.[6]

(c) The rule that partial disability is not made total by the fact that any work is attended with discomfort, pain and occasional illness, resulting in temporary interruptions, if the doing of the work does not substantially aggravate the malady.[7]

(d) The conclusion of total disability is not consonant with proof that the insured has followed a substantially gainful employment with substantial continuity without material injury to his health, i.e., work done may be such as conclusively to negative total permanent disability.[8]

(e) That the failure of an assured in the work which he undertakes to do, or his inability to successfully follow his accustomed occupation which is occasioned by his general inaptitude for the work rather than by bodily injury or disability, does not establish the permanent and total character of the disability.[9]

(f) Frequently serious physical impairment stimulates to successful effort for acquisition of productive ability that theretofore remained undeveloped.[10]

(g) The policy does not insure success in business undertakings.[11]

(h) An insured is not totally disabled if he is able to earn substantial wages at *light* work without injury to his health.[12]

(i) The policy is not against non-employment.[13]

(j) And non-employment of itself is not evidence of impairment or a basis of recovery and the same is true of voluntary cessation of work.[14]

(k) No man is to be deemed totally and permanently disabled who is not totally and permanently disabled within the common acceptation and meaning of these terms.[15]

(l) The fact that the insured's condition is such as to require that he have assistance in carrying on a business is not proof of total disability.[16]

(m) A partial disability is the antithesis

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[5]U. S. v. Pfaff, 93 F. (2d) 823; U. S. v. Gibbons, 93 F. (2d) 856; Wise v. U. S., 63 F. (2d) 307 (5th CCA); Eggen v. U. S., 58 F. (2d) 616 (8th CCA) cited with approval on this point in Eq. L. Assn. Soc. v. Singletary, 71 F. (2d) 409 (4th CCA); U. S. v. Clapp, 63 F. (2d) 793 (2nd CCA); U. S. v. Hill, 62 F. (2d) 1022 (8th CCA); Theberge v. U. S., 87 F. (2d) 697 (2nd CCA); U. S. v. Ivey, 64 F. (2d) 653 (10th CCA); U. S. v. Peet, 88 F. (2d) 597 (10th CCA); Puckett v. U. S., 70 F. (2d) 895 (5th CCA); U. S. v. Stack, 62 F. (2d) 1056 (4th CCA).

[6]U. S. v. Steadman, 73 F. (2d) 706 (10th CCA); McGovern v. U. S., 294 F. 108.

[7]U. S. v. Burns, 69 F. (2d) 635 (5th CCA); Lumbra v. U. S., 78 L. Ed. 492; White v. U. S., 53 F. (2d) 565 (CCA); U. S. v. Martin, 54 F. (2d) 554 (CCA); U. S. v. Harth, 61 F. (2d) 541 (CCA); U. S. v. Vineyard, 71 F. (2d) 624 (5th CCA); U. S. v. Anderson, 88 F. (2d) 291 (1st CCA); Theberze v. U. S. 87 F. (2d) 697 (2nd CCA); U. S. v. Deal, 82 F. (2d) 929 (9th CCA); U. S. v. Kerr, 61 F. (2d) 800 (9th CCA); U. S. v. McCreary, 61 F. (2d) 804 (9th CCA); U. S. v. Harless, 76 F. (2d) 317 (4th CCA); U. S. v. Hainer, 61 F. (2d) 581 (9th CCA).

[8]U. S. v. Burns, 69 F. (2d) 636 (5th CCA); Lumbra v. U. S., 78 L. Ed. 492; U. S. v. Wilson, 50 F. (2d) 1063 (4th CCA); U. S. v. Anderson, 88 F. (2d) 291 (1st CCA); Miller v. U. S., 79 L. Ed. 977; U. S. v. Spaulding, 79 L. Ed. 617; Grant v. U. S., 74 F. (2d) 302 (5th CCA); Lemore v. U. S., 90 F. (2d) 329 (5th CCA); U. S. v. McDevitt, 90 F. (2d) 592 (2nd CCA); U. S. v. Lemore, 89 F. (2d) 6 (2nd CCA); U. S. v. Rice, 47 F. (2d) 749 (9th CCA); Long v. U. S., 59 F. (2d) 602 (4th CCA); U. S. v. Martin, 54 F. (2d) 554 (5th CCA); Nance v. U. S., 58 F. (2d) 236 (5th CCA); U. S. v. McGill, 56 F. (2d) 522 (8th CCA); Byrne v. U. S., 77 F. (2d) 829 (2nd CCA); Lawhon v. U. S. 82 F. (2d) 921 (10th CCA); U. S. v. Perry, 55 F. (2d) 819 (8th CCA).

[9]Miller v. U. S., 79 L. Ed. 977.

[10]Lumbra v. U. S., 78 L. Ed. 492.

[11]U. S. v. Latimer, 73 F. (2d) 311 (5th CCA); U. S. v. Timmons, 68 F. (2d) 654 (5th CCA).

[12]U. S. v. Messinger, 68 F. (2d) 234 (4th CCA); U. S. v. Rosborough, 62 F. (2d) 348 (4th CCA); Smith v. U. S., 63 F. (2d) 252 (7th CCA); U. S. v. Tucker, 65 F. (2d) 661 (4th CCA); U. S. v. Coward, 76 F. (2d) 875 (4th CCA); U. S. v. Ellis, 62 F. (2d) 348 (4th CCA); White v. U. S., 53 F. (2d) 565 (5th CCA).

[13]U. S. v. McCreary, 61 F. (2d) 804 (9th CCA).

[14]U. S. v. McAlister, 88 F. (2d) 379 (9th CCA); U. S. v. Hill, 61 F. (2d) 653 (9th CCA); Hanagan v. U. S., 57 F. (2d) 860 (7th CCA); U. S. v. Weeks, 62 F. (2d) 1030 (8th CCA); U. S. v. Harrison, 55 F. (2d) 825 (8th CCA); Crockrell v. U. S., 74 F. (2d) 151 (8th CCA).

[15]U. S. v. Diehl, 62 F. (2d) 343 (4th CCA); Nordberg v. U. S., 51 F. (2d) 271 (D. C.); U. S. v. Alvord, 66 F. (2d) 455 (1st CCA).

[16]U. S. v. Shashy, 75 F. (2d) 422 (5th CCA); U. S. v. Haywood, 73 F. (2d) 378 (5th CCA); O'Quinn v. U. S., 70 F. (2d) 599 (5th CCA); U. S. v. Harris, 66 F. (2d) 71 (4th CCA); U. S. v. Donahue, 66 F. (2d) 838 (8th CCA).

of the total disability which the contract contemplates as a basis of recovery.[17]

(n) That total disability does not exist where the insured is mentally and physically capable of becoming qualified to follow a substantially gainful occupation but elects not to make the effort, i.e., that the policy does not insure against neglect or opportunity.[18]

(o) The mere fact that the insured's disability constitutes a serious handicap in the pursuit of a gainful occupation is insufficient.[19]

(p) Medical opinion of total and permanent disability is without probative weight when it is opposed to the physical facts.[20]

(q) That the burden is upon the insured to establish that disability is within the terms of the contract by a clear preponderance of the evidence and with reasonable certainty.[21]

(r) This burden is not carried by leaving the matter in the realm of conjecture and surmise.[22]

(s) In the absence of substantial evidence of total and permanent disability it is the duty of the court to direct a verdict for the insurer.[23]

Needless to say, the above stated principles are decidedly hand-picked and are not set forth as necessarily representing the weight of judicial opinion under war risk contracts. In their selection I have merely endeavored to collate a few of the announcements which are of particular value in combatting fraudulent and unfounded claims and which are not otherwise well fortified by precedent.

While not directly within my subject, I wish to venture the opinion that the most effective tool in your disability kit box is the use of the Federal Declaratory Judgment Act. The uncertainties surrounding the availability of this procedure in actions by the insurers to ascertain their rights and legal relations under disability contracts have, in large measure, been removed by the recent decisions. The advantages to be derived from the procedure are numerous and distinct from a practical, as well as a legal, standpoint.

However, whether or not you acquire Federal jurisdiction, under the above Act, or otherwise, it is my belief that you can step up your batting average in the defense of disability litigation by making full use of the principles and precedent contained in the many able war risk decisions.[24]

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[17]U. S. v. Linkhart, 64 F. (2d) 747 (7th CCA); U. S. v. Jones, 73 F. (2d) 376 (5th CCA); U. S. v. Spaulding, 79 L. Ed. 617; Lumbra v. U. S., 78 L. Ed. 492; Wilmer v. U. S. 87 F. (2d) 164 (7th CCA); U. S. v. Sumner, 69 F. (2d) 770 (6th CCA); Parker v. U. S., 62 F. (2d) 1055 (4th CCA); U. S. v. Pulling, 63 F. (2d) 381 (8th CCA).

[18]U. S. v. Hooper, 73 F. (2d) 665 (5th CCA); Proechel v. U. S., 59 F. (2d) 648 (8th CCA); U. S. v. Luckinbill, 65 F. (2d) 1000 (10th CCA).

[19]U. S. v. Harth, 61 F. (2d) 541 (8th CCA); Personious v. U. S. 65 F. (2d) 645 (9th CCA).

[20]U. S. v. Spaulding, 79 L. Ed. 617; U. S. v. Shashy, 75 F. (2d) 422 (5th CCA); U. S. v. Hill, 62 F. (2d) 1022 (8th CCA); U. S. v. Weeks, 62 F. (2d) 1030 (8th CCA); U. S. v. Mayfield, 64 F. (2d) 214 (10th CCA); U. S. v. Perry, 55 F. (2d) 819 (8th CCA).

[21]Walters v. U. S., 63 F. (2d) 299 (5th CCA); U. S. v. McCreary, 61 F. (2d) 804 (9th CCA); Proechel v. U. S., 59 F. (2d) 648 (8th CCA); U. S. v. Elmore, 68 F. (2d) 551 (5th CCA); Lebank v. U. S., 65 F. (2d) 514 (5th CCA); Miller v. U. S., 79 L. Ed. 977.

[22]Robinson v. U. S., 87 F. (2d) 343 (2nd CCA); Proechel v. U. S. 59 F. (2d) 648 (8th CCA); U. S. v. LeDuc, 48 F. (2d) 789 (8th CCA); U. S. v. Rentfrow, 60 F. (2d) 488 (10th CCA); U. S. v. Hill, 62 F. (2d) 1022 (8th CCA); U. S. v. Crume, 54 F. (2d) 556 (5th CCA); U. S. v. Anderson, 76 F. (2d) 337 (4th CCA); Falbo v. U. S., 64 F. (2d) 948 (9th CCA); U. S. v. McShane, 70 F. (2d) 991 (10th CCA); U. S. v. Becker, 86 F. (2d) 818 (7th CCA).

[23]Miller v. U. S., 79 L. Ed. 977; U. S. v. Spaulding, 79 L. Ed. 617; Lumbra v. U. S., 78 L. Ed. 492; Wilmer v. U. S., 87 F. (2d) 164 (7th CCA); U. S. v. Preslar, 85 F. (2d) 866 (6th CCA).

[24]References: See Annotations in 55 A. L. R. 580, 73 A. L. R. 319, 81 A. L. R. 934; Couch, Vol. 8, Sec. 2298 and particularly same paragraph of supplement. See counsel's brief in 78 L. Ed. 492 at 494 for cases holding evidence insufficient as matter of law.

Federal Courts Clarify Rights of Sureties on Bonds of Government Contractors and Establish Procedure for Enforcement

By JOHN A. LUHN, *Vice President*
Fidelity & Deposit Company of Maryland, Baltimore, Maryland

THE year 1937 produced two decisions, one by the Supreme Court of the United States, and one by the U. S. Court of Appeals for the District of Columbia, which are of considerable importance to sureties on bonds of contractors on U. S. Government contracts. Both cases support the surety's right to an equitable lien on the funds derived from the contract and each case, though involving a different set of facts, tends to establish a course of procedure which a surety may follow in order to get relief.

The first case *Martin v. National Surety Corporation*, 81 L. Ed. 521, was decided in March and is no doubt familiar to lawyers engaged in the handling of surety cases. The Supreme Court upheld the surety's right to the fund derived from the contract, and in addition disposed of some of the questions that have arisen in connection with Section 3477 of the Revised Statutes. It is not my purpose to comment on that case at this time.

The second case referred to was decided by the U. S. Court of Appeals for the District of Columbia on December 13, 1937, and has not yet been reported. The case is *Morganthau, Secretary of the Treasury, et al v. Fidelity & Deposit Company of Maryland.* Briefly, the facts were these:

The contractor was unable to complete his contract; the surety advanced money for the purpose of having the contract completed; and in addition paid laborers and material men whose claims the contractor had failed to satisfy. The amount expended by the surety exceeded the amount due from the Government to the contractor. The Government drew a voucher for the amount due. The surety filed a bill against the Secretary of the Treasury and the Treasurer of the United States to enjoin payment of the money to the contractor, and asked for a receiver to collect the fund and hold it for the protection of the surety. The contractor was a resident of Massachusetts. The lower court granted the surety the relief asked for. On appeal the Government took the position that its only interest in the case was to secure a valid acquittance in making payment of the money due. It contended that the appointment of the receiver was void because the court did not have jurisdiction of the contractor, a non resident, that there was no res in the District which would form the basis for constructive service on the contractor, and finally it contended that the surety had no lien or equitable interest in the fund. The Court of Appeals rejected all of the Government's contentions. On the question of jurisdiction, the surety relied on Section 105 of the District of Columbia Code, which provides in effect that publication or personal service of process outside of the District may be had against a non resident in any suit involving a claim or demand to or against any real or personal property within the jurisdiction of the court. The surety contended that the voucher drawn by the Government constituted a res. The Court of Appeals supported this view, pointing out in this connection that there is a difference between a check drawn by an individual and a voucher properly drawn by an officer of the U. S. Government. Consequently, the court upheld service of process outside of the District and affirmed the order of the District Court appointing a receiver to take charge of the fund for the protection of the surety.

In disposing of the Government's contention that the surety had no lien or equitable interest in the fund, the Court of Appeals adhered to prior decisions of the Supreme Court of the United States and various decisions in Circuit Courts of Appeal which support the position contended for by the surety. In connection with this phase of the case the Government argued that the surety had no valid claim because of the provisions of Section 3477 of the Revised Statutes. The Government's position was that the assignment of the retained percentage executed by the contractor in favor of the surety was void because it did not meet the requirements of the Statute. The court answered this con-

tention by pointing out that Section 3477 of the Revised Statutes had never been construed to apply to assignments by operation of law. Consequently, the court ignored the assignment made by the contractor and granted the surety relief on the theory of an equitable assignment. The court's ruling on this particular question was in accord with what the Supreme Court of the United States held in the Martin case.

The result of the two decisions is that the rights of a surety in cases of this kind seem to be now well defined, and in addition the courts have removed whatever doubt may have existed heretofore as to the interpretation to be given Section 3477 of the Revised Statutes.

It is significant that in the first of the two cases mentioned the surety instituted proceedings in the jurisdiction in which the contractor resided, and in the second case the surety instituted proceedings in Washington, notwithstanding that the contractor was a resident of another jurisdiction. In both cases the surety was successful in obtaining the relief asked for. While the facts in the two cases are not the same, the principles announced in the decisions seem to establish definite courses of procedure which may be followed in future cases of this kind.

Wilful Act As Defense Under Liability Policy

By Harvey E. White
Norfolk, Virginia

RECENTLY the writer was interested in a case wherein an insured under an automobile liability policy pursued the driver of another automobile in order to make him stop and when the driver of the other car, fearing a physicial altercation, would not stop, the assured, in order to compel him to stop, drove alongside his car and then pulled into it, forcing it upon a sidewalk and into a tree. The driver of this car and occupant therein were injured and the automobile badly damaged.

The insured did not deny that the injuries were caused in this manner and gave a signed statement to that effect.

Subsequently an action was brought by the occupants of the car against the insured in which it was alleged that the insured wilfully and with malicious intent caused the accident but when it was called to the attention of the attorneys for these people that the insured's policy only covered the insured for injuries accidentally sustained they filed an amended complaint in which the allegations were changed to charge reckless and negligent operation of the automobile by the insured.

This set of facts necessarily involved a question of whether or not this was an accident under the terms of the policy and if the insurance company would be justified in denying liability and refusing to defend these suits.

The policy provided that if "any person or persons shall sustain bodily injuries by accident . . . or any property . . . shall be accidentally injured or destroyed by reason of the ownership, maintenance or use of any of the automobiles described (in policy) . . . for which bodily injuries and/or injury or destruction of property the Insured . . . are liable for damages . . ." then the insurance company agrees to pay any judgment within the limits of said policy.

In the case of *Sontag v. Galer*, 279 Mass. 309, 181 N. E. 182, the plaintiff, who had obtained a judgment for personal injuries against the defendant, Galer, brought suit to establish the indebtedness of the insurance company on a liability insurance policy issued by it to her and to have the proceeds of the policy applied in satisfaction of the judgment.

The facts in the case were that while the plaintiff was on Galer's premises he was struck on the head by a porcelain cooking utensil which she "maliciously, wantonly and recklessly threw" at him.

The policy undertook to indemnify the defendant, Galer, from liability for damages on account of bodily injuries "accidentally sustained". The Court held that the policy did not protect the insured from her own intentional and malicious actions and that, therefore, there was no liability on the part of the insurer to the injured plaintiff.

Incidentally, the Court also held that decisions under the compensation act with reference to accidental injuries are not controlling.

In the case of *Adams v. Marlany Casualty Company*, 139 So. 453, 162 Miss. 237, it was held that a person not a party to a contract of insurance, but for whose protection the policy provides, can stand only upon the terms of the contract and has no greater rights than the insured.

In *Stejus, et al., v. London & Lancashire Indemnity Co. of America*, 166 A. 339 (N. J.), it was held that an automobile liability insurer indemnifying the insured only for accidental injuries to injured third persons, when sued by injured third persons for an unsatisfied judgment could not plead that the judgment against the insured was for wilful injuries where the complaint against the insured only alleged negligence.

In this case there is a dissenting opinion in which it is pointed out that by holding that the insurer cannot plead wilful and intentional wrong prevented the insurance company from having its day in Court and deprived it of its right to be heard on the contract, and also that the case was not one of res adjudicata, as the insurance company had not been a party to the original suit.

In the case of *Blair v. Travelers Ins. Co., et al.*, (Mass.) 197 N. E. 60, it was held that the injured party's rights can be no greater than the rights of the insured and if a defense exists which would defeat the insured's action on the policy then such defense would also defeat an action by the injured party.

However, in the case of *Miller v. U. S. Fidelity & Casualty Co.* (Mass.), 197 N. E. 75, which immediately followed that case, it was held that where a judgment was obtained in an action by an injured party against the insured in a foreign state based solely on a declaration alleging negligence, that the declaration in the original case was conclusive on that point against the insurance company as the judgment in the foreign state was presumably based on the allegations of negligence contained in the declaration.

The Court held that the insurer was bound by the result in the original action on all matters therein decided which were material to recovery by the insured on an action on the policy, whether the insurer defended the original action or not. In the course of the opinion the Court said that it was common knowledge that protection against liability from negligence is the principal purpose of liability policies and the insurance company was not permitted to show facts indicating wilful misconduct.

It may be worthy of note that this action was brought by the insured against the insurance company after the insurance company had declined to defend and the insured had paid judgments rendered against him, and also that the insured denied any intention of actually injuring the plaintiffs in the original suit.

In *Wheeler v. O'Connell*, et al., (Mass.), 9 N. E. (2nd) 544, the Court held that under the compulsory insurance act, the purpose is to provide compensation to persons injured rather than protection to the insured and that a person injured by the wilful misconduct of a truck driver was entitled to recovery on a compulsory motor vehicle insurance policy.

In *Westerland v. Argonaut Grill, et al* (Wash.), 60 Pac. (2nd) 228, where a restaurant patron was injured as a result of an unjustifiable assault by an employee, the insurer was held liable under a liability policy in garnishment proceedings, the Court holding that whether an injury was accidental must be determined from the standpoint of the injured and not the insured.

In the case of *Baron v. Auto Mutual Indemnity Co.* 285 N. Y. S. 486, the patron of a taxi company was assaulted by the driver and the Court held that the policy issued under the New York statute was intended to afford protection from negligent "operation or use" but not from an unprovoked assault.

In this case there is a dissenting opinion and the court was divided three to two.

In the case of *Indemnity Ins. Co. v. Jordan*, 158 Va. 834, it was held that the injured third party had no greater rights against the insurance company than the insured himself.

Although it might be reasonable and just for a Court to hold an insurer liable as a matter of law in a case wherein the insured denied any wilful misconduct and a judgment was rendered against him in the original action for negligence only, yet to hold that the insurance company would be precluded from setting up wilful misconduct as a defense where the insured has previously admitted his intentional act would hardly seem either reasonable and just, unless it be conceded that the injured party has greater rights than the insured himself.

Reverting to the case the writer was interested in, he filed a special plea setting up:

(1) That in accordance with the terms of the policy, the insured had furnished the insurer with a written and signed report and statement in which it clearly appeared that

the act of the insured was wilful and intentional and, therefore, that there was no coverage under the insurance contract.

(2) That, among other things, the reason for the requirement in the insurance contract providing that the insured must make a written report to the insurance company was to enable the insurance company to determine whether or not there was coverage.

(3) That a signed statement so given and not retracted was binding on the assured and those in privity with him or holding under him.

(4) That the law granted no greater rights to the injured plaintiff in the original action than the insured himself had.

(5) That the insurance company and the insured were the principal contracting parties and the policy must be viewed in that light in construing the word "accident" contained therein.

(6) That the plaintiff in the original complaint alleged wilful misconduct on the part of the insured.

(7) That both the original plaintiff and the assured having previously taken the position that the injuries were caused by a wilful act, they were estopped from thereafter taking a position inconsistent therewith.

Attorneys for plaintiff moved to reject the special plea.

To sustain the plea, the case of *White v. Botts,* 158 Va. 442, 158 S. E. 880, 163 S. E. 397, was cited. In that case it was said:

> "Where a party gives a reason for his conduct and decision touching anything involved in the controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is estopped from doing it by a settled principle of law". *Ohio & M. Railway Co. v. McCarthy,* 96 U. S. 258, 267, 24 L. Ed. 693; Oakland, etc., *Co. v. Wolf Co.* (C. C. A.), 118 Fed. 239; *Goodman v. Purnell* (C. C. A.), 187 Fed. 90; *Heckscher v. Blanton,* 111 Va. 648, 653, 69 S. E. 1045, 37 L. R. A. (N. S.) 923; *Arwood v. Hill's* Adm'r, 13[illegible] Va. 235, 243, 117 S. E. 603; *Robinson v. Shepherd,* 137 Va. 687, 120 S. E. 26[illegible] *Nagle v. Syer,* 150 Va. 508, 143 S. E. 69[illegible]

And on rehearing the Court further said:

> "A party cannot, either in the course of litigation or in dealings *in pais,* occupy inconsistent positions. Upon that rule election is founded; a man shall not be allowed, in the language of the Scotch law, 'to approbate and reprobate'. And where a man has an election between several inconsistent courses of action, he will be confined to that course which he first adopts; the election, if made with knowledge of the facts, is itself binding, it cannot be withdrawn without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of position. Bigelow on Estoppel, page 733." *Arwood v. Hill's Admr.,* 135 Va. 235, 117 S. E. 603, 606.

The motion to reject the plea was overruled and the case was set for trial, but what the outcome would have been is a matter of conjecture, as a compromise was reached.

The cases cited herein indicate that the weight of authority is that while the injured party has no greater rights under the policy than the insured, yet the insurance company's rights are concluded by the allegations contained in the pleadings of the original suit, thus preventing the insurance company from having a hearing on the merits.

It is our hope that the defense set up in the writer's case will be helpful to suggest a possible means of circumventing the ruling in these decided cases, and permit the insurer to have its day in court on the actual merits, rather than on the pleadings filed in the original suit.

Is Mr. Justice Black Justified in Desiring a Uniform System of Jurisprudence?

By MARION N. CHRESTMAN
Dallas, Texas
(LLOYD E. ELLIOTT—*Collaborating*

THE Federal Courts do not consider themselves bound by the state laws on general commercial transactions, *Swift v. Tyson*, 16 Peters 1, 10 L. Ed. 865, which include insurance laws, where not governed by local statute. *Carpenter v. Provident Washington* (1842), 16 Pet. 495, 10 L. Ed. 1044. *Lawrence v. Travelers Ins. Co.* 6 Fed. Supp. 428. This rule produces, in many instances, two distinct sets of insurance laws applicable to the same jurisdiction, whereby recovery may depend upon whether the case be lodged in the State or Federal Court.

Mr. Justice Black, in his series of dissents against the established order of things federal, takes note of this situation in *New York Life Ins. Co. v. Gamer*, 82 L. Ed. 480 (advance sheet), wherein he dissents from the holding that the presumption against suicide disappeared with the introduction of any substantial evidence to the contrary, on the ground that the holding was contrary to Montana law, in which state the case arose and was tried. Deprecating the existence, in one jurisdiction, of two sets of laws, he said:

> "The result is that suits on policies for less than $3000.00 tried in State Courts will frequently be decided by rules different from the rule which governs similar suits tried in federal courts because they involve more than $3000.00. In an orderly and consistent system of jurisprudence, it is important that the same law should fix and control the rights of recovery on substantially identical contracts made in the same jurisdiction and under the same circumstances."

(Cf. dissenting opinion in *Hartford Fire Ins. Co. v. Nance*, 12 F. (2d) 577).

The effect of a dual system of laws is strikingly illustrated by the divergent holdings between state and federal courts in Texas on the rights of beneficiaries in life insurance contracts. Three situations may be mentioned:

1. It is a general rule, applied in the federal courts, that since everyone has an insurable interest in his own life, it is immaterial that a beneficiary named by an insured has no insurable interest. Vance (2d Ed.) 151-154. Cooley Briefs (2d Ed.) 336-7. But Texas courts consider it against public policy to permit one having no insurable interest to profit from being named as a beneficiary in a life policy, even where taken out by insured. *Wilkes v. Finn*, 39 S. W. (2d) 36. Hence, whether in which circumstances the named beneficiary or the personal representative of the assured shall recover in Texas depends upon which court, state or federal, renders the judgment.

2. The general rule, applied in the federal court, is that a life insurance policy, valid because insurable interest existed at the inception of the policy, is enforceable upon the happening of the contingency upon which the policy is payable, notwithstanding the beneficiary may not have an insurable interest at that time. Thus a divorced wife may recover on a life policy under the federal rule. Conn. *Mutual Insurance Co. v. Schaefer*, 94 U. S. 475, 24 L. Ed. 251, *Wellhouse v. United Paper Co.*, 29 F. (2d) 886, *Kansas City Life Ins. Co. v. Adamson*, 24 F. (2d) 712. But that is not the Texas law. Insurable interest in the life must exist at the time of the death of the insured; and hence the divorced wife under Texas law cannot recover and take the proceeds of a life policy on her former husband. *Whitesell v. Northwestern Mutual* 221 S. W. 575. Here again the contest between the named beneficiary and the estate of the insured is determinable solely by which court, state or federal, renders the judgment.

3. In *Warnock v. Davis*, 104 U. S. 782, 26 L. Ed. 924, the Supreme Court of the Uited States held that the assignment of a life policy to one having no insurable interest was invalid and passed no rights to the assignee. The courts of Texas adopted this theory; and in this state an assignee of a life policy must have an insurable interest, just as the beneficiary must have such an interest. *Equitable Life Ins. Co. v. Hazlewood*, 12 S. W. 61.

In *Grigsby v. Russell*, 222 U. S. 149, 56 L.

Ed. 133, *Warnock v. Davis* was explained by Justice Holmes on the theory that the assignment there was shown to have been simultaneously with the execution of the policy and as a part of a scheme to obtain a policy by one having no insurable interest in the life insured, thereby making the transaction a mere wager. The court then held that a policy valid at its inception may thereafter be freely assigned to anyone, regardless of the want of insurable interest in the assignee; and that is now the rule in the federal court. *Midland National Bank v. Dakota Life Ins. Co.* 277 U. S. 346, 72 L. Ed. 911. So that if an assignee of a life policy, valid at its inception, sues in the federal court, he may recover the entire proceeds, whereas if he is obliged to litigate the matter in the state court, the personal representative of the insured will recover the entire proceeds less actual outlays made by the assignee.

Further complications arise in the above situations by reason of the inability of either the federal or state courts to assume exclusive jurisdiction of personal actions, or enjoin proceedings one of the other. 28 U. S. C. A. 379; 14 R. C. L. 420, *Kline v. Burke Construction Co.*, 260 U. S. 236, 67 L. Ed. 226, 24 A. L. R. 1077. Thus it may happen that the named beneficiary in a life policy may bring suit in the federal court, while the personal representative of the assured files a similar suit in the state court. Each may join the other as a party defendant in his respective suit; but neither the federal court nor the state court may enjoin the proceedings one of the other. In consequence two suits may be prosecuted at one and the same time, and the ultimate victor is the one who can first bring his action to a final determination. Unless the insurer has some ground for an equitable bill, and files an interpleader and puts the money in the court, it is put to the defense of two actions. And if in the peculiar circumstance it files an interpleader and puts the fund in court, it thereby, in choosing the court in which to file its suit, settles the right of the parties beneficiary and personal representative.

Another situation prevailing more generally is that resulting from the difference between the federal and state court law on equitable estoppel, arising before or at the inception of the contract. *Hartford Fire Ins. Co. v. Nance*, 12 F. (2) 575.

In *Union Mutual Life v. Wilkinson*, 80 U. S. 222, 20 L. Ed. 617, the Supreme Court of the United States held that an insured was not bound by answers written in an application for insurance by an agent on the statement of a third party. This decision gave impetus to the now almost universally recognized doctrine of equitable estoppel, under which the insured may show by parol conduct of the insurer or its knowledge prior to the inception of the contract making inequitable reliance on forfeiture provisions of the contract. But the doctrine thus announced by the federal court was subsequently repudiated. *Northern Assurance Co. v. Grandview Building & Loan Ass'n*, 183 U. S. 308, 46 L. Ed. 213, *Lumberman's Underwriters v. Rife*, 237 U. S. 605, 59 L. Ed. 1140, so that the federal rule now is that the policy will be enforced as written, unless reformed for accident, mistake or fraud. *Bankers Life v. Sone*, 86 Fed. (2d) 780.

It may therefore result that an insured under state court rule could recover on a policy, because an estoppel could be raised against the insurer to plead violation of a condition, whereas under the same state of facts no recovery could be had in the federal court, because the parol evidence rule would operate to exclude testimony whereby the plain effect of the written contract could be changed by transactions occurring, or knowledge of the agent obtained, prior to the inception of the contract. The large number of cases turning upon the doctrine of equitable estoppel (32 C. J. 1343; 5 Cooley's Briefs 4207 et seq.) shows the importance of this noted difference in federal and state law.

It would therefore seem desirable that the same law control the right of recovery on the same contract in the same jurisdiction. If a party may win or lose solely because one court or the other obtains jurisdiction of his case, or first finally adjudicates the same, the administration of justice depends too much on chance to be conducive to a proper respect for the law.

The federal courts might well adopt the reasoning of Justice Black that 28 U. S. C. A. 725 requires those courts to conform to the law of the state. Presumably also the state has it within its power to make its rule of decision local law, binding on the federal courts, by enacting them into statutes. *Clay v. Aetna Life Ins. Co.*, 53 Fed. (2d) 689, *Hartford Ins. Co. v. Nance*, 12 Fed. (2d) 575. Conversely, if the federal law is preferable, it might be made statutory. Uniformity is the important thing.

Physical or Mental Incapacity as an Excuse for Failure to Give Notice of Accident or Make Proof of Disability Required by Provisions of Accident and Life Insurance Policies

By FRANK C. HAYMOND
Fairmont, West Virginia

RECENT investigation and consideration by the writer of this interesting and practically important subject discloses conflict of authority and some confusion in the decisions of courts which have considered the question, with the result that uncertainty exists upon a legal problem concerning which uniformity and certainty of decision might reasonably be expected.

The cases in which this question has been considered may for convenience be divided into two groups.

The first group deals with the failure of the insured or the beneficiary to give the notice of the accident or to make the proof of the disability. In this group no question arises involving any requirement of the policy concerning payment of premiums or other acts by the insured necessary to render the policy valid or to continue it in force. Though in this group there is conflict in the decisions and marked diversity in the reasoning of the courts, the weight of authority is decidedly to the effect that the insured or the beneficiary in policies requiring notice of the accident or proof of the disability within the period stipulated by the policy is excused from compliance with the requirement if he is prevented from so doing by reason of mental or physical incapacity caused by the accident or disability, provided such notice or proof is given within a reasonable time after he recovers from his incapacity. The courts which adopt this view, as a general rule, consider the requirement of the policy, regardless of the language used, as being in effect a condition subsequent rather than a condition precedent, and justify this conclusion upon a variety of grounds. Some of the reasons given are the doctrine of liberal construction of the insurance contract in favor of the insured, the reluctance of courts to declare a forfeiture, the recognition of an implied exception in favor of the insured relieving him from compliance with the requirement in case of his incapacity, in the absence of language requiring notice or proof notwithstanding the incapacity of the insured, and the principle that the insured or the beneficiary should not be denied recovery for the loss insured against because of his failure, while mentally or physically incapacitated, to comply with requirements to be performed after the loss occurred which are merely incidental to the payment of the indemnity and are not necessary to the life or the continuance of the policy.

The doctrine of this group of cases though recognizing the reasonableness and the validity of such requirement of the policy, refuses to give it the effect of defeating the right of recovery when the failure of the insured to make strict compliance results from incapacity which renders compliance upon his part impossible. It is submitted that this view is sound, gives the insured the protection contemplated by the policy, and ordinarily results in no injustice to the insurer. Some of the cases which follow this rule and advance the reasons upon which it is founded merit particular mention. One of the earliest and best known decisions of this type is the Nebraska case of *Woodmen Accident Association v. Pratt*, decided in 1901, 62 Neb. 673, 55 L. R. A. 291, 89 Am. State Reports 777, 87 N. W. 546, in which the court held that an insured who suffered a fall by accident resulting in a concussion of the brain which deranged and crazed his mind so that he could not intelligently give notice regarding the accident within the time required, was in law excused, by his condition, from compliance with the conditions of the policy in that respect during the time of the continuance of his disability, and in arriving at that result the court says:

> "The conclusion is, we think, fairly deducible that in construing conditions in a policy of insurance with respect to the giving notice of the happening of the event, and the particulars thereof, and preliminary proofs, to be complied with subsequent to the event resulting in loss or injury, and

for which indemnity is claimed, a more liberal construction in favor of the beneficiary should be given than when the conditions are to be complied with prior to the happening of such event, and for the purpose of continuing the policy in force and effect; that such provisions as to the time in which the notice is required to be given or proofs furnished are not necessarily and in every instance to be literally complied with, in order to prevent a forfeiture of the policy, or entitle a party to recover for a loss or injury resulting from the happening of the event for which indemnity is claimed; that a reasonable and natural construction should be given such provisions, in order to carry out the evident intention and manifest purpose of the parties to the contract, and the object to be accomplished thereby; that when a time is fixed in a policy of accident insurance for the giving of notice of an accident and injury resulting therefrom for which indemnity is claimed, with the particulars thereof, which is reasonable in its character, this will be regarded as a condition precedent to be complied with before recovery can be had, but when, because of circumstances and conditions surrounding the transaction, obstacles or causes exist preventing and rendering impossible the performance of the act within the time stipulated, the act may be performed thereafter, and the beneficiary will be excused for the failure, if done within a reasonable time, or within the time stipulated after the obstacle or cause preventing prior compliance ceases to exist."

In the Missouri case of *Hayes v. Continental Casualty Company,* decided in 1903, 98 Mo. App. 410, 72 S. W. 135, in permitting the insured to recover notwithstanding his failure to give the required notice within the time specified in the policy, the court held that it was not within the contemplation of the parties to the contract that if the accident for which the indemnity was provided should render the insured incapable of giving such notice the insurer should for that reason escape liability. The same court, in the later case of *Roseberry v. American Benevolent Association,* decided in 1909, 142 Mo. App. 552, 121 S. W. 785, concluded that a provision in an accident policy that notice of the injury should be given within ten days did not, as a matter of law, in the absence of an express stipulation to that effect, require strict compliance by the insured when, by reason of his injuries and the use of opiates in treating it, he was incapacitated beyond the time provided for the giving of the notice and the notice was given within a reasonable time after the termination of such incapacity, and held that notice given under such circumstances was sufficient to enable the insured to recover.

Another authority to the same effect is the Wisconsin case of *Comstock v. Fraternal Accident Association,* decided in 1903, 116 Wis. 382, 93 N. W. 22, in which a stipulation in an accident policy requiring the insured to give notice to the insurer within ten days of the accident under penalty of forfeiture of his claim for indemnity was held not to apply if the insured was incapacitated by reason of his injuries from giving such notice, and in arriving at that conclusion the court read into the policy an exception saving the rights of the insured from forfeiture for failure to comply with the requirement when he was so incapacitated.

The minority view, which denies the insured the right of recovery for failure to comply strictly with the requirement of the policy to give notice, is presented in perhaps its most positive form in the New York case of *Whiteside v. North American Accident Insurance Company,* decided in 1911, 200 N. Y. 320, 35 L. R. A. (N. S.) 696, 93 N. E. 498, in which the court of appeals of that state held that the assured was not relieved from the obligation imposed upon him by the terms of his policy to give notice of illness or injury within a specified time, because his illness was of such character as to render him delirious and unable to remember that he had such policy, and recognized a distinction between an obligation imposed by law and an obligation freely and voluntarily assumed by him. It is believed that the Whiteside case is unsound and that it will not be followed in many other jurisdictions. The distinction drawn by the New York court and accepted by several other courts is illogical. A valid obligation absolute and without qualification in character should be uniformly effective without regard to the manner in which it is imposed. No sufficient reason seems to exist for relaxing the force of the requirement because created by operation of law and exacting strict compliance therewith because voluntarily undertaken.

It is believed that the most satisfactory of the reasons advanced in support of the majority rule, which excuses the failure to give

the required notice of accident or proof of disability causing incapacity of the insured, is that in the absence of express language of the policy to the contrary, the parties, at the time of entering into the contract, did not intend it to have any other or different meaning or effect. Obviously no insurer could sell, and no insured would buy, accident or disability insurance, upon terms which would render the happening of the contingency insured against the means of destroying the protection which the insurer undertakes to give and which the insured expects to receive under the contract of insurance.

In the second group the decisions determine the effect of the failure of the insured or the beneficiary to give notice of the injury or proof of the disability for which indemnity is sought as required by the policy, when the insured, by reason of the accident or disability, is rendered physically or mentally unable to give the notice or make the proof before the next premium becomes due, and relies upon a provision of the policy providing indemnity for such disability and waiving the payment of premiums during its continuance. This question raises an interesting and difficult problem of insurance law. May the incapacitated insured or his beneficiary, in such situation, recover the disability benefits provided by the policy when the required notice or proof is not given? Some courts of high standing answer the question in the affirmative; other courts of equally high standing, and perhaps in greater number, answer the same question in the negative. In this group the reasoning of the courts, as in the first group, is diverse and varied, and the conflict of authority is more pronounced. It is difficult, if not impossible, to determine on which side of the issue the weight of authority rests. Some text writers declare that the weight of authority is with those courts which allow the insured or his beneficiary to recover; others place it with the courts which resolve the question in favor of the insurer. In the opinion in the North Carolina case of *Rhyne v. Jefferson Standard Life Insurance Company*, 199 N. C. 419, 154 S. E. 749, in which recovery by the guardian of an insane insured was allowed, the claim is made that the weight of authority supports the decision, but in the case of *Egan v. New York Life Insurance Co.*, 60 Fed. (2d) 268, in which the court denied recovery, it is declared that that decision is in accord with the overwhelming weight in number and cogency of reasoning of the courts in jurisdictions in which the question has been considered. The difficulty which confronts the practitioner in a jurisdiction in which the point has not been determined is obvious.

Some of the reasons given by courts which permit recovery are that the requirement is a condition subsequent and not a condition precedent, that there is an implied exception, in the absence of language clearly requiring notice or proof notwithstanding the incapacity of the insured, that there is a distinction between payment of premiums and the furnishing of proof of actual disability, that the rule of liberal construction of insurance contracts applies, that courts are unwilling that a forfeiture be enforced, desire to avoid a construction rendering the contract unfair or oppressive, and recognize an ambiguity demanding liberal construction in favor of the insured and interpretation to the effect that the parties to the contract did not intend the stipulation to defeat the protection contemplated by the contract or to require the insured to do something which his condition makes it impossible for him to do.

On the other hand, the courts which deny recovery, conclude that the doctrine of the sacredness of contracts applies, that the policy requirement of notice and proof is not ambiguous, that such requirement is not unreasonable and should be complied with, that such requirement amounts to a condition precedent, and not a condition subsequent, that compliance therewith is necessary to enable the insurer to determine and maintain its financial status, that there is a valid distinction between an obligation imposed upon the insured by statute and an obligation voluntarily assumed by him, and that the requirement should be enforced according to its plain meaning and effect.

Among the leading cases which permit the insured or his beneficiary to recover notwithstanding failure to give the notice or furnish the proof required by the policy when the insured is unable to do so because of physical or mental incapacity caused by the accident or disability, is the Virginia case of *Swann v. Atlantic Life Insurance Company*, decided in 1931, by the Supreme Court of Appeals of Virginia, 156 Va. 852, 159 S. E. 192. In that case the beneficiary sued to recover on a life insurance policy issued by the defendant to her husband. The policy contained the usual provision for payment of total and permanent disability benefits and

waiver of premiums by the insured in the event of total and permanent disability of the insured prior to age 60 while the policy was in force if the insured should furnish satisfactory proof of the disability to the insurer. Before the policy lapsed for nonpayment of premium the insured became disabled, within the terms of the policy and thereby rendered physically and mentally incapable of furnishing proof of his disability prior to his death. By reason of these facts the beneficiary contended that the furnishing of proof was excused. This contention was upheld by the court and the right of the beneficiary to recover was sustained, the court holding that the requirement of the policy, unless clearly to the contrary, should be read with an exception reasonably saving the insured's rights from forfeiture when due to no fault upon his part he is totally incapacitated from giving notice, that the requirement of the policy should be liberally construed, its primary purpose being to insure or provide for indemnity, and that notice and proof of disability were not, under the circumstances, a condition precedent to the right to waiver of premiums.

Another holding to the same effect is the earlier case of *Rhyne v. Jefferson Standard Life Insurance Co.*, decided by the Supreme Court of North Carolina in 1929, 196 N. C. 717, 147 S. E. 6, re-heard in 1930, 199 N. C. 419, 154 S. E. 749, in which the guardian of an insane insured sought to recover under permanent disability clauses in two life insurance policies issued to the insured by the defendant, by which the insurer promised to waive the premiums and pay certain monthly disability benefits if, after payment of the first and before default in the payment of any subsequent premium, the insured should furnish to the company due proof of total and permanent disability preventing him from pursuing any occupation for remuneration or profit, and in which it appeared that the insured became insane while the policies were in force, but did not, during the life of the policies, furnish proof of his disability. The plaintiff sought to excuse the failure to furnish proof because he was prevented from doing so by reason of his insanity. The trial court denied recovery and entered a judgment of nonsuit, but on appeal the Supreme Court of North Carolina reversed the judgment of the court below. The single question presented to the appellate court was whether total disability or insanity, which rendered the insured incapable of furnishing proof of the disability, as required by the policy, could be considered as having been reasonably within the minds of the parties to the contract at the time it was entered into, in the absence of unequivocal language covering such situation. In holding that proof of such disability, rendering the insured incapable of furnishing such proof, was not in the minds of the parties when the contract was entered into, the court in the opinion rendered upon the first hearing of the case says:

> "It may be conceded that the decisions are variant as to whether, under any circumstances in a case like the present, liability can survive failure to comply with the requirement of notice. The clear weight of authority, however, seems to be in favor of the plaintiff's position. The reasons assigned by the different courts, in support of the majority, view, are not altogether harmonious, and some perhaps are inconclusive. They are all considered in a learned opinion by Nortoni, J., in *Roseberry v. American Benev. Association*, 142 Mo. App. 552, 121 S. W. 785. But we are content to place our decision on the broad ground that, notwithstanding the literal meaning of the words used, unless clearly negatived, a stipulation in an insurance policy requiring notice should be read with an exception reasonably saving the rights of the assured from forfeiture when, due to no fault of his own, he is totally incapacitated from acting in the matter. That which cannot fairly be said to have been in the minds of the parties, at the time of the making of the contract, should be held as excluded from its terms. *Comstock v. Fraternal Accident Ass'n*, 116 Wis. 383, 93 N. W. 22. The primary purpose of all insurance is to insure, or to provide for indemnity, and it should be remembered that, if the letter killeth, the spirit giveth life. *Allgood v. Hartford Fire Ins. Co.*, 186 N. C. 415, 119 S. E. 561, 30 A. L. R. 652; *Grabbs v. Farmers' Mut. Fire Ins. Ass'n*, 125 N. C. 389, 34 S. E. 503."

Among other cases in accord with the holdings of the Swann and the Rhyne cases are *Metropolitan Life Ins. Co. v. Carroll*, 209 Ky. 522, 273 S. W. 54; *Missouri State Life Ins. Co. v. Le Fevre* (Court of Civil Appeals of Texas) 10 S. W. (2d), 267; *Southern Life Ins. Co. v. Hazard*, 148 Ky. 465, 146 S. W. 1107; *Leven*

v. Metropolitan Life Ins. Co., 138 S. C. 253, 136 S. E. 304; *Marti v. Midwest Life Ins. Co.*, 108 Neb. 845, 189 N. W. 388, 29 A. L. R. 1507; *Pfeiffer v. Missouri State Life Ins. Co.*, 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600; and *Minnesota Mut. Life Ins. Co. v. Marshall* (C. C. A. 8th Circuit) 29 Fed. (2d) 977.

The contrary rule, denying recovery, is adopted by the Supreme Court of Appeals of West Virginia in the recent case of *Iannarelli v. Kansas City Life Ins. Co.*, decided in 1933, 114 W. Va. 88, 171 S. E. 748. In that case the committee of an insane insured sought to have a life insurance policy declared to be in force and effect, the insured restored to his rights and benefits thereunder and the insurer required to keep the policy in force without further payment of premiums during the disability of the insured. The policy contained the ordinary total disability benefit provisions for waiver of premiums and payment of total and permanent disability benefits in case of such disability of the insured while the policy was in force, upon receipt of due proof of such disability. After the payment of the premium for the first year, and within the year, the insured became insane. No proof of disability, as required by the terms of the policy was ever furnished, and no information as to insured's disability was furnished the company until after the period of grace for the payment of the second annual premium had expired. The court held that under the policy the furnishing of proof of disability, as required by the policy, was a condition precedent to the waiver of premiums necessary to keep the policy in force and that insanity of the insured at the time the policy lapsed for default in the payment of premium did not excuse the failure to furnish such proof. In its opinion the court says:

"There is nothing in that clause to excuse the furnishing of proof of disability while the contract is in effect. If an insured becomes insane or disabled so that he cannot himself furnish proof of disability, that duty can be performed by some one for him, but if no one knows about the policy there is presented an unfortunate situation attributable to the lack of precaution or the non-communicativeness of the insured. It is not a contingency insured against by the insurer.

"There is another reason of primary importance why contractual provisions of this sort in life insurance policies must be interpreted in the light of the phraseology employed and not in the light of extraneous consideration. Life insurance has come to occupy a most important field and to discharge an indispensable function in modern society. The life insurance companies are enabled to function only on the basis of standard mortality and experience tables. These companies must comply with fixed requirements of state statutes. Neither the actuaries of the companies nor the insurance commissioners of the states could determine with any degree of definiteness the liability to which the companies might be subjected at any given date on account of outstanding insurance, if at the same time there are a large number of policies, supposedly lapsed and forfeited, under which there may be liability because of total disability of the insured at the time of the forfeiture, though the insurer had no notice of such disability."

Another leading case to the same effect is that of *Smith v. Missouri State Life Ins. Co.*, decided in 1932, by the Supreme Court of Kansas, 134 Kan. 426, 7 Pac. (2d) 65. In that case the court denied the claim of the beneficiary under a life insurance policy which provided, among other things, that after one full annual premium had been paid and before default in the payment of any subsequent premium, if the insured, prior to attaining the age of 60, should furnish evidence satisfactory to the company that he was wholly disabled from bodily injury or disease and that he would be permanently, continuously and wholly thereby prevented for life from pursuing any gainful occupation, the company, during such disability, would waive payment of premiums payable under the policy, when it appeared that the insured, though so disabled before the policy lapsed for non-payment of premiums, failed within that time to furnish the required proof of his disability. Speaking of the rule adopted by the court and denying the plaintiff's claim to recover, the court says:

"On its face, the rule may seem harsh, but an examination into the basic principles of the insurance contract is convincing that it is sound and reasonable. The payment of premium is the life of the contract. All actuarial calculations are based upon the payment of premium at the time specified in the contract, and by reason thereof

the state is able to determine whether the company can make good its contracts. If the beneficiary may wait until more than a year after the claimed disability and the death of the insured to make the claim of total disability, which is generally a question of fact, then the certainty of liability of insurance companies cannot be established nor the amount of their reserve definitely determined. Anything that destroys the certainty of contracts necessarily affects the whole structure, and the sacredness of contracts should not be unnecessarily invaded or impaired by judicial interpretation."

Another well considered case which reaches a conclusion similar to that of the Iannarelli and the Smith cases is the earlier case of *New England Mutual Life Ins. Co. v. Reynolds,* decided by the Supreme Court of Alabama in 1928, 217 Ala. 307, 116 Southern 161, 59 A. L. R. 1075, in which, under substantially the same circumstances that existed in the Smith case the court refused to allow a recovery by the beneficiary of the deceased insured. The reasoning of the court recognizes the necessity of notice to the insurer of the disability to enable it to know the status of each contract of insurance issued by it, in order that it may have information as to its resources and liabilities. The court further held that under the provisions of the policy waiving premiums in the event of permanent and total disability of the insured if proof of the disability were furnished the insurer, the furnishing of such proof constituted a condition precedent to the waiver of premiums. The case is also of interest because of the comparison made in the opinion of cases involving accident insurance in which the insured, by the policy, is required to give notice of his injury within a specified time, and cases involving claims for disability under a policy containing waiver of premium clauses. The court was of the opinion that the two types of cases are distinguishable and discusses the point in this language:

"We think there is a manifest distinction between that class of cases and this. In such accident cases, the provision is in the nature of a condition subsequent wherein the insurer defends against a liability already accrued. In this case the beneficiary relies upon the waiver clause to keep the policy alive, to excuse the payment of premiums. The disability set up in accident cases is usually the result of the injury insured against. Here there is no insurance against disability, physical or mental."

Other cases in which the holdings are in agreement with those of the three cases last above mentioned are *Bergholm v. Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230, 76 L. Ed. 416; *Egan v. New York Life Ins. Co.,* 60 Fed. (2d) 268; *Dean v. Northwestern Mut. Life Ins. Co.,* 175 Ga. 321, 165 S. E. 235; *Wick v. Western Union Life Ins. Co.,* 104 Wash. 129, 175 Pac. 953; *Courson v. New York Life Ins. Co.,* 295 Pa. 518, 145 Atl. 530; *Berry v. Lamar Life Ins. Co.* (Miss.) 142 So. 445; *New York Life Ins. Co. v. Alexander,* 122 Miss. 813, 85 So. 93; and *Da Corte v. New York Life Ins. Co.,* 114 W. Va. 172, 171, S. E. 248.

In summarizing the decisions of the courts in the two groups of cases, it is submitted that in the first group the general rule, supported by the decided weight of authority, is that if the insured is rendered physically or mentally incapable of giving notice of his injury or making proof of his disability, within the time stipulated in the policy, he will not lose his right to indemnity if he gives such notice or makes such proof within a reasonable time after his incapacity ceases. In the second group the cases are in sharp and apparently irreconcilable conflict, but it is believed that the decisions which deny recovery by the insured or the beneficiary because of the failure of the insured, due to his physical or mental incapacity to give notice or furnish the proof required by the policy adopt the correct rule and support it by satisfactory reasons.

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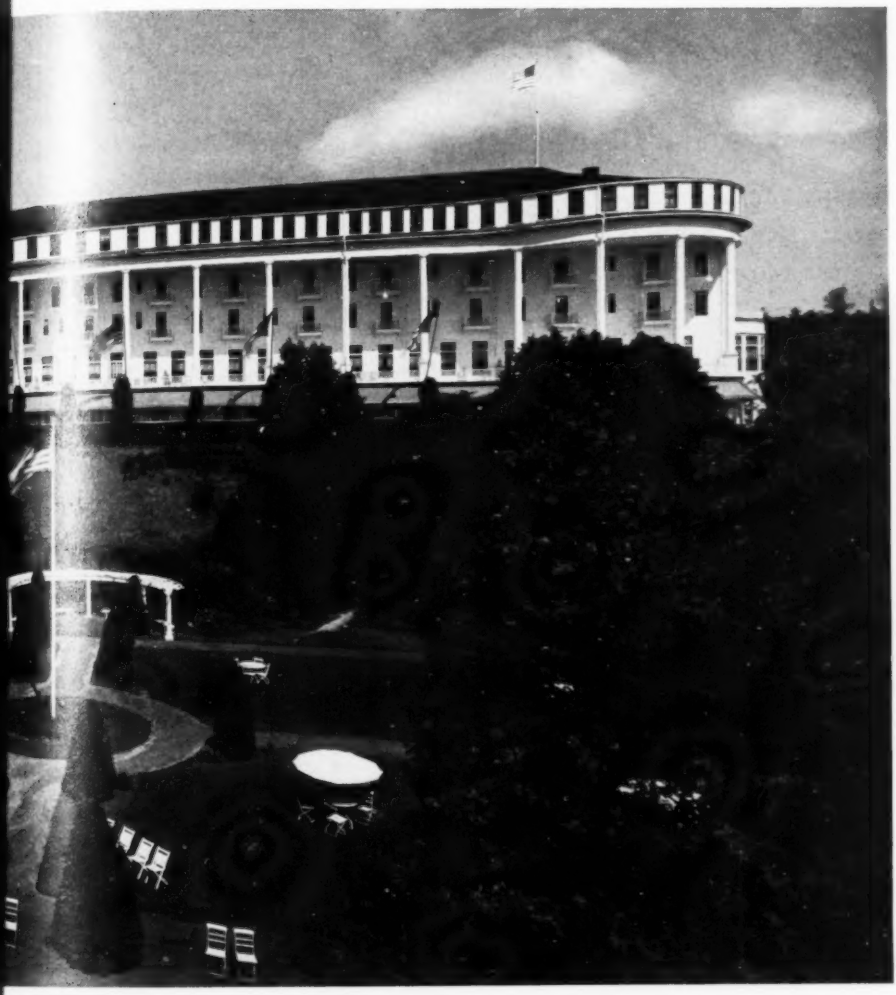

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How Home Office General Counsel Operate and How They Like to be Treated

By Milo H. Crawford
Detroit, Michigan

PERHAPS the most important job of Home Office Counsel is to retain lawyers in many different localities to represent their companies.

This job can be conducted most successfully only if general counsel have a wide and intimate knowledge of those members of the Bar who are versed in insurance law and who are capable of trying defendant's law suits successfully.

It naturally follows that the best place to meet such lawyers is at the Annual Convention of our membership. Here general counsel have the best opportunity of sizing up practicing lawyers from all sections of the country.

The practicing lawyers who are members of our Association (and they are more than 95% of the membership) must remember that general counsel already have retained in most of our large business centers lawyers who have been with their companies for many years and who have been giving these companies faithful and competent representation.

General Counsel do not appreciate being approached by lawyers (whether members of our Association or not) who in one way or another are soliciting business. The lawyers who do this fall into the following classes:

1. Those who write letters or call on general counsel without any previous introduction;

2. Those who purchased shares of stock in a company and try to use this as a means of introduction;

3. Those who presume on an acquaintanceship by membership in a Bar Association, whether local or national;

4. Those who know general counsel well enough either as school mates or good personal friends to say casually: "Why don't you send me some business?"

5. Those who presume on friendship gained by a membership in our Association, and I am happy to learn from general counsel themselves, that there have been only isolated instances such as these.

It is an easy matter for general counsel to diplomatically dispose of the lawyers mentioned in the first four classifications. They are told that the attitude of their Company is one of loyalty to counsel who have represented the Company over a substantial number of years; that they will not change counsel simply because there is some lawyer in the community to whom they would prefer giving their business for personal reasons as long as the existing representative continues to take care of their company's business on a satisfactory basis. Further, they believe that this sort of loyalty is respected by the Bar and that there is a better understanding with the Bar because of this loyalty.

However, when members of our Association approach general counsel asking them for business, it becomes more difficult for general counsel to courteously tell them why such an approach should not be made. The reason, of course, is obvious. In an Association of our size, the chances to become more intimate and to have many more genuinely close friends is much better than in a large group like the American Bar Association, and it is much harder to turn down a request of a good friend than one made by a mere acquaintance.

By knowing most of the lawyers in the various localities who might be suitable to handle insurance work, general counsel are able to make a quick change in their representation in any given community should such an occasion arise, because of death or for other reasons. Also general counsel have to call in outside representation due to conflict of interests of the attorneys then representing a particular company.

I feel sure that home office counsel feel sympathetic with the difficulties which lawyers encounter because of the rules of ethics in acquiring new business. My own judgment is that without lowering the dignity of the profession, lawyers through meeting

prospective clients in one way or another, can do more for themselves in the way of bringing in business by avoiding all discussion of possible business rather than by making a direct approach for it.

Home office general counsel are just "folks" like the rest of the lawyers in our Association, and naturally, they do not like to feel that their friendship is being cultivated for business reasons. Such treatment would take away to a very large extent the pleasure and profit they derive from being members of our Association and attending the Conventions. Why can't we treat home office counsel in exactly the same fashion that we would any other practicing attorney whom we come in contact with and would like to have as a personal friend?

The Law in Accident Cases in the Federal Court

By Richard B. Montgomery, Jr.
New Orleans, Louisiana

THE Federal Courts do not follow the state law in cases involving general insurance contracts and the construction of ordinary contracts of insurance. This has been the law since the case of *Carpenter v. Providence Washington Insurance Company*[1] and has been universally accepted by most of the Federal Courts.[2] Some doubt has recently been thrown upon this doctrine by the case of *Mutual Life Insurance Company v. Johnson*[3]. In this last case the Court held that the question of whether or not insanity waived the condition precedent of furnishing proofs of disability in a life policy which created such a requirement before the payment of such disability benefits was a matter of local law and that the Federal Court should not decide the matter, but should follow the law of Virginia. This is certainly contrary to the language of the Court in the *Carpenter* Case, wherein the Court said:

> "The questions under our consideration are questions of general commercial law and depend upon the *construction of a contract of insurance*, which is by no means local in its character or regulated by any local policy or custom."

I believe that the Court will in the vast majority of cases follow the *Carpenter Case*. It, therefore, behooves an insurance counsel to know which law will afford better protection to his client—the law of the State Court or the law of the Federal Court. This article is an attempt to place at the disposal of insurance counsel the law of the Federal Court in regard to the interpretation of Accident Insurance Policies in such a way that he can ascertain with sureness and quickness which law is the more favorable in order to determine whether or not to remove to the Federal Court.

I will first take up the question of the burden of proof. In the Federal Court there is no doubt but that the burden of proof in suits upon Accident Policies is upon the plaintiff to bring the accident or death within the provisions of the policy. There can be so little doubt as to this that it does not require citations. Furthermore, the Federal Court does not accept the theory of the shifting of the burden of proof by reason of the existence of a presumption. The Federal Court as was shown in a previous article,[4] has gone even further and held that the presumption disappears from the case. The Federal Court has recently held in suicide cases that not only does the presumption not shift the burden of proof and disappears from the case[5], but that the judge should not even mention the existence of the presumption to the jury, once it has disappeared upon the production of evidence of suicide. The first Federal Case to so hold was *Jefferson Stand-*

[1] 16 Peters 495; 10 Supreme Court, 1048; 10 L. Ed. 1044.

[2] Hawkeye Commercial Mens Association v. Christy, 294 Fed. Rep. 208; Sharland v. Washington Life Insurance Company, 101 Fed. 206.

[3] 55 Sup. Ct. Rep. 154; 293 U. S. 335.

[4] "The Effect of the Presumption Against Suicide Upon Burden of Proof in Life and Accident Cases", by Richard B. Montgomery, Jr. Insurance Counsel Journal, October, 1935, Page 51.

[5] Frankel v. New York Life Insurance Company, 51 Fed. (2d) 933; Travelers Insurance Company v. Wilks, 76 Fed. (2d) 701.

ard Life Insurance Company v. Clemmer.[6] In this case the Court said:

"(3, 4) Ordinarily, it is not necessary to refer to the presumption against suicide in the charge to the jury. If the basic fact of death by violence is admitted, or proved, the presumption arises, and in the absence of countervailing evidence, the judge should direct a verdict for the plaintiff. If such evidence is produced, the judge should charge the jury in the usual fashion. He may of course refer in his discretion to the improbability of suicide as an inference of fact, based on the common experience of mankind, but the jury should be permitted to give the inference such weight as it deems best, undisturbed by the thought that the inference has some sort of artificial probative force which must influence their deliberation. Likewise as to the opposing evidence, the jury should be instructed to weigh its credibility and effect in the usual way, and finally, upon the whole evidence, to determine whether death by accident has occurred, bearing in mind that if the evidence leaves their minds in such doubt that they are unable to decide the point, the verdict should be against the party upon whom the burden of persuasion rests. Such a charge can be easily understood and enables the jury to do justice to both sides. But when the court goes further and introduces the presumption itself as evidence to be considered by the jury, or places the burden on the defendant to satisfy the jury by a preponderance of evidence, he states the principle too strongly and may cause a miscarriage of justice; and a fortiori when he imports into the trial the rule of reasonable doubt applicable in prosecutions for crime, he makes it well-nigh impossible for the jury to find for the defendant. The result has been in many cases of self-destruction to be found in the books, that judge and jury alike have been unable to take a common-sense view of the facts of life, and have seemed to be the only persons in the community who did not clearly understand what had taken place."[7]

This has been approved by the United States Supreme Court in the case of *New York Life Insurance Company v. Gamer.*[8] The Court in this case criticized the language in the case of *Travelers Insurance Company v. McConkey*[9] and said that case did not hold that the presumption had any weight after the introduction of evidence of suicide. The former was a suit upon a policy insuring against death resulting directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, and the Court held that where the evidence was sufficient to sustain a finding that the death was not due to accident, that there was no presumption of accidental death; that presumption was not evidence and could not be given weight by the jury as such. In other words, the law of the Federal Courts now is clearly to the effect that the presumption against suicide in accident cases disappears when sufficient evidence of suicide is offered by the defendant to sustain a verdict in its favor and that thereafter the presumption disappears from the case and should not be mentioned or spoken about to the jury and may not be given any weight as evidence.

The next question is whether or not the Federal Courts distinguish between policies insuring against accidental death and policies insuring against death resulting from bodily injury effected solely through accidental means. One of the most cited cases upon this subject is the case of *United States Mutual Accident Association v. Barry.*[10] This case has undoubtedly been cited more often by the counsel for the plaintiff in cases involving policies containing the provision insuring against injury resulting solely from accidental means than any other case and it has been miscited by them invariably for the proposition that there is no distinction between an injury from accidental means and

[6]79 Fed. (2d) 724, decided by the Court of Appeal for the Circuit. See Radius v. Travelers Insurance Co. 87 Fed. (2d) 412 for the usual and customary reasoning on this point.

[7]There are State Court decisions holding to the same effect which might be of interest: Domanowski v. Prudential Ins. Co. of America, 182 Atl. 906, Court of Errors and Appeals of New Jersey; Watkins v. Prudential Insurance Company, Supreme Court of Pennsylvania, 315 Pa. 497; Griffith v. Continental Casualty Co., Supreme Court of Missouri, 299 Mo. 426; Smith v. National Benefit Society, 123 N. Y. 85; Plumb v. Richmond Light & R. R. Co., 233 N. Y. 285; Curth v. New York Life Insurance Company, Supreme Court of Michigan, 265 Northwestern, 749.

[8]No. 323 of the docket of the U. S. Supreme Court, decided February 14, 1938 and as yet unreported.

[9]127 U. S., 661; 8 Sup. Ct. Rep. 1360.

[10]9 Sup. Ct. Rep. 755; 131 U. S. 100.

an accidental injury. As a matter of fact this case squarely recognizes the distinction. The only thing that this case held was that in the petition before it the jury had the right to find that something unusual, namely, some unusual twist or unexpected jar which was not intended by the plaintiff, occurred during his jump from a platform. This is clearly shown by the language of the court:

> "The Court properly instructed them that the jumping off the platform was the means by which the injury, if any, was caused; that the question was whether there was anything accidental, unforeseen, involuntary and unexpected in the act of jumping from the time the deceased left the platform until he alighted on the ground; that the term 'accidental' was used in the policy in its ordinary public sense as meaning happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected; that if a result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected manner, it cannot be called a result effected by accidental means, but that if in the act which precedes the injury something unforeseen, unexpected, or unusual occurs which produces the injury, then the injury is resulted through accidental means."

Although there are a few cases where the Federal Courts have held that this case was authority for the proposition that the Supreme Court did not recognize the distinction and that an accidental result would be sufficient to allow a recovery, the majority of the Federal Courts have held to the contrary. In the case of *United States Fidelity & Guaranty Company v. Blum*,[11] the Court squarely held that if a man deliberately placed himself in a position where he would fall, realizing that such would be the result of his act, it could not be said that his injury came about through external, violent and accidental means, within the terms of the policy. In the case of *Baldwin v. North American Insurance Company of Chicago*[12] the Insured was injured through a strain resulting from voluntary exertion in attempting to hold an automobile which started to move from a jack. The Court held that the injury was not through accidental means. In the case of *Whitehead v. Railway Mail Association*[13] the Court of Appeal for the 5th Circuit held that the death of an Insured resulting from his voluntary act in getting off a moving train while passing over a bridge was not due to accidental means. There are many cases to the same effect.[14] The Supreme Court of the United States reaffirmed the doctrine again in *Landress v. Phoenix Mutual Life Insurance Company*.[15] In this case the Court held that to establish liability under the policy covering death from bodily injury effected through external, violent and accidental means, it is insufficient that the death or injury was accidental in the sense of being extraordinary or unforeseen, but that the means of effecting such bodily injury must in themselves be accidental. The Court then, in speaking of the *Barry case*, said that there was clearly evidence from which the jury might have inferred that the Insured alighted in a manner not intended causing a jar or shock of unexpected severity and that otherwise it would not have been correct for the trial judge to have left the question to the jury. At this point it might be well to call attention to the fact that in the *Landress Case* Justice Cardoza dissented, saying:

> "There is really no justice in this supposed distinction, which members of the Association of Life Insurance Counsel are striving to impress upon the courts, between 'accidental injury' and 'injury by accidental means' . . . And I believe that a vast majority of prospective policy holders, and of all men of ordinary or above ordinary intelligence, outside of the Association of Life Insurance Counsel, would be led to join in the wonder of John Byrom:
>
> 'Strange all this difference should be Twixt Tweedledum and Tweedledee.'"

The writer believes that in most sets of facts there is no reason to stress the difference between an accidental death and accidental

[11] 270 Fed. 953.
[12] 22 Fed. (2d) 111.
[13] 269 Fed. 25.
[14] Anderson v. Travelers Protective Association of America, 74 Fed. (2d) 170; Carswell v. Railway Mail Association, 8 Fed. Rep. (2d) 612; Nickman v. New York Life Insurance Company, 39 Fed. (2d) 763; Pope v. Prudential Insurance Company of America, 29 Fed. (2d) 185; Lyon v. Travelers Protective Association of America, 25 Fed. (2d) 596; Davis v. Jefferson Standard Life Insurance Company, 73 Fed. (2d) 330.
[15] 54 Sup. Ct. Rep. 461; 291 U. S. 491.

means, or rather, to put it this way, that in most cases there should be no recovery either under the doctrine of Cardoza or under the marjority doctrine. Chief Justice O'Neill of the Louisiana Supreme Court in a dissenting opinion in the case of *Parker v. Provident Life & Accident Insurance Company,*[16] decried the distinction in much the same language. However, after a long dissertation, he closes with this language:

"Of course if an injury results from the doing of something exactly as it was intended to be done and without any miscalculation as to the extent to which it could be safely done, the injury is not accidental in any sense, but is intentional, and the Insurance Company in such a case is not liable, or if an injury results from doing some ordinary and customary act which could not of itself caused the injury to a person in sound health, the Company is not liable, because the Company's liability is limited by the terms of the policy to injuries caused directly, solely and independently of all other causes by accidental means."

It seems to the writer that the ones who deny the distinction invariably arrive at the same distinction when they attempt to apply the rule to individual acts, and that in many instances a counsel can win his case by avoiding an argument over words. There can be no doubt but that there is a valid distinction between an accidental injury and an injury from accidental means which should be recognized by all courts.

The Federal Courts have gone very far in interpreting these policies favorably to the companies, in determining whether disease contributed to the death. We find in cases where the policy provides that the injury must be solely due to accidental causes and that it must not result directly or indirectly from bodily disease or mental infirmity, that the Federal Courts have placed upon the plaintiff the burden of excluding by a fair preponderance of the evidence, disease as a cause of death, either directly or indirectly. The Circuit Court of Appeal for the 5th Circuit, in the case of *Ryan v. Continental Casualty Company,*[17] said that the burden was on the plaintiff to prove that the insured's death resulted solely from accident; that the insured's death was not caused solely by accident if the accident would not have caused death except for previously existing disease or infirmity which was aggravated by the effect of the accident. In this case the insured was assisting in loading ice in a railroad car on the morning of his death. While pulling the ice from the truck into the car, he slipped and fell down. After lying there for a while, he got up and went to his home in an automobile and died about thirty minutes afterward. The plaintiff put a physician on the stand, who testified that the cause of death was probably a ruptured aorta, but that he did not see any external evidence of injury. The physician who conducted the autopsy was unable to state whether or not there was a rupture of the aorta. The Court held that there should have been a directed verdict for the defendant, saying that a finding that his death was due solely to his accidentally slipping and falling and not to voluntary exertion in handling the ice would have been a guess or surmise and not a finding based on evidence having a substantial tendency to prove that what accidentally happened was the sole cause of the death. *Lyon v. Travelers Protective Association*[18] was a similar decision. In this case the plaintiff attempted to recover on a policy insuring against injury due to accidental means, on the theory that the insured was thrown against the wheel of an automobile which he was driving, which caused the bursting of a blood vessel. The Court held that such purported proof was mere conjecture, and insufficient to support a recovery on the Accident Policy in the absence of proof of complaint by the insured, or any bruises or other evidence of injury appearing on his body. The Court held that there should have been a directed verdict for the defendant. There are other cases to the same effect.[19] There can be no doubt but that the rule in the Federal Court is that the plaintiff must prove by a

[16]152 So. 583; 178 La. 977.
[17]47 Fed. (2d) 472.

[18]Dorgan v. Insurance Company, 58 Fed. 945, 6th Circuit; Commercial Travelers Insurance Company v. Fulton, 79 Fed. 423, 2nd Circuit; Illinois Commercial Association v. Parks, 179 Fed. 794, 2nd Circuit; Kerns v. Aetna Life Insurance Company, 291 Fed. 289, 8th Circuit; Maryland Casualty Company v. Morrow, 213 Fed. 599, 3rd Circuit; New Amsterdam Casualty Company v. Shield, 155 Fed. 54, 6th Circuit; Shanberg v. Fidelity & Casualty Company, 158 Fed. 1, 8th Circuit; Travelers Insurance Company v. Selden, 78 Fed. 285, 4th Circuit; Lincoln National Insurance Company v. Erickson, 42 Fed. (2d) 997; Brown v. Maryland Casualty Company, 55 Fed. (2d) 159.

fair preponderance of evidence that the death was due solely to injury effected through accidental means, that the plaintiff carries the burden of negativing the presence of preexisting disease; that the proof cannot be mere conjecture or supposition. In the case of *Landress v. Phoenix Mutual Life Insurance Company*,[15] the Supreme Court held that an allegation that death was from sunstroke while playing golf did not state a cause of action on a policy covering death from bodily injury effected through external, violent and accidental means. Another case to the same effect is *Paist v. Aetna Life Insurance Company*.[19] In the case of *Nickman v. New York Life Insurance Company*,[14] cited previously, the Court held that where an insured going about business exposed himself to excessive heat and died, the injury was not effected through accidental causes, high temperature not being accidental.

There are several other interesting Federal Court cases which should be discussed. One is the *Mutual Life Insurance Company of New York v. Dodge*.[20] The Court of Appeal for the 4th Circuit in this case held the insured's death was caused by a local administration of novocaine preliminary to the operation, because of hypersusceptibility to such drug. The Court then held that the death was the result of injury through accidental means and that such a hypersusceptibility was not a bodily infirmity or disease, but was a mere condition. In the case of *Interstate Business Men's Accident Association v. Lewis*[21] the Circuit Court of Appeal for the 8th Circuit held that where the Insured punctured a pimple with an infected pin and the infection was immediately communicated and spread so as to cause death, that the means of the said death were accidental. The case of *Business Men's Accident Association of America v. Schiefelbusch*[22] held that death from blood poisoning due to an infected abraison caused by the insured's rubbing his head with an infected towel was a death due to accidental means. *Aetna Life Insurance Company v. Brand*,[23] held that where a surgeon was closing an incision after an operation and punctured an artery with his needle, that death was due to accidental means. It has been held that a raw place caused by a new and stiff shoe which subsequently became infected and caused death, was due to accidetal means.[24] Death caused by coming in contact with poison ivy,[25] by blood poisoning as the result of pulling a hair from the nose,[26] by septicemia because of germs entering through an abrasion on the finger,[27] has been held to result from accidental means.

It is the writer's opinion that the best definition of injury resulting from accidental means is to be found in the case of *Nickman v. New York Life Insurance Company*. In this case the Court said:

> "In this case there was nothing accidental in walking the streets, standing near a hot kettle, climbing a ladder or standing upon a roof. These were all intentional acts. He (the insured) did not, of course, intend to be stricken, and his death was, therefore, unexpected, but it was not caused by accidental means. The best that may be said for the plaintiff's case is that the insured's death was unexpectedly brought about by acts which the insured himself intentionally committed."

The language of the Court in the case of *Davis v. Jefferson Standard Life Insurance Company*[24] is also worthy of notice:

> "That there was an accidental death caused in part by an external means (the anesthetic), which by a strain is held to be violent, is apparent; that the means was an accidental one is not so plain, as no mistake or slip occurred in its use. By the weight of authority a means is not made accidental because some unexpected result followed in addition to that which was intended to be accomplished. *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U. S. 491, 54 S. Ct. 461, 78 L. Ed. 934, 90 A. L. R. 1382. But irrespective of that, it is clear to us that the fatality cannot be said to have been effected by this external violent means, because it was due also to the internal bodily weakness without which there would have been no death. This was also a 'bodily infirmity' within the clause of exception, for infirmity includes

[19] 54 Fed. (2d) 393.

[20] 11 Fed. (2nd) 486.

[21] 257 Fed. 241.

[22] 262 Fed. 354.

[23] 265 Fed. 6, 6th Circuit Court of Appeal.

[24] Western Commercial Travelers' Ass'n v. Smith 85 Fed. 401.

[25] Railway Mail Association v. Dent, 213 Fed. 981.

[26] Maryland Casualty Company v. Massey, 38 Fed. (2d) 724.

[27] Continental Casualty Co. v. Willis, 28 Fed. (2d) 707.

abnormal weakness as well as acute disease. Insurance against death by accident is usually afforded for a small premium, and the coverage is correspondingly narrow. The liability is guarded by carefully chosen words. Courts have no more right by strained construction to make the policy more beneficial by extending the coverage contracted for than they would have to increase the amount of the insurance. The insurance here is not against unintended death from bodily injury effected by violent, external means generally, but only when the violent, external means can be said to be accidental and when they solely and independently of all other causes produce the death. If a bodily infirmity, though unknown at the time, is a concurring cause without which death would not have resulted, the policy does not cover the case. *Landress v. Phoenix Mutual Life Ins. Co., supra; Travelers' Protective Association v. Davis, supra; Ryan v. Continental Casualty Co.* (C. C. A.) 47 F. (2), 472. The Count was properly stricken."

This article is written without any intention of drawing deductions or expounding any theory of the writer, but solely for the purpose of being of some assistance in presenting the Federal cases which involve policies containing provisions insuring against death resulting solely through accidental means. The writer, however, feels it obligatory to say that as a general rule, the Federal Courts have interpreted the language as written and have refused to be led into rewriting the policy under any claims that the language is ambiguous. The only discordant note is that of Justice Cardoza. It is interesting to note that he held the opinion which he expressed in the *Landress Case* even as a judge of the Court of Appeal. In the case of *Lewis' Executrix v. Ocean Accident & Guarantee Corp., Ltd.*[25] we find him saying:

> "Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin, and thereby became lethal. . . . 'Probably it is true to say that in the strictest sense and dealing with the region of physical nature, there is no such thing as an accident'. . . . But our point of view, in fixing the meaning of this contract, must not be that of the scientist. It must be that of the average man. . . . Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts."

In this case it was the means and not the result which was accidental. Whereas it is true that the insured intended to puncture the pimple and did not intend to do so with an infected needle or to drive infection into the pimple, there was, therefore, something unusual and out of the ordinary happening in the act preceding the death.

[25] 224 N. Y. 18, 120 N. E. 56.

Right of Injured Party, Who Has Obtained Judgment Against an Assured, to Bring Action Against the Insurance Company During Pendency of an Appeal Without Bond

By A. L. Barber
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It is not intended that this article shall be an exhaustive or scholarly brief, but merely a practical discussion of a problem that sooner or later will confront every lawyer defending personal injury suits for assureds. The question I would try to think through and answer, though not to a definite and final conclusion, is: "What course shall the Insurance Company pursue when judgment is recovered against its assured for more than the policy limit, an appeal taken without supersedeas, and during the pendency of the appeal an execution is issued against the defendant-assured, returned nulla bona, and

then suit is filed against the Insurance Company on the policy?"

In the case before us the Company had issued its policy to a certain truck operator and filed it in the office of the Corporation Commission. The limits were five and ten. One Saturday night, after the day's work was done and the trucks had been parked in their usual place, one of the drivers, without the knowledge or permission of the employer, got in one of the trucks and drove to the Missouri State Line for some gin. He not only got the gin, but got ginned, and on the way home, drove the truck in a weaving way down the highway, ran into a man who was on his way to "church meetin", and killed him. The widow brought suit against the truck owner and it was defended by the Insurance Company on the theory that at the time and place of the accident the servant was not engaged on the business of the master, but was acting outside the scope of his employment, on a mission of his own. Judgment was rendered in favor of the widow and minor children for $10,000.00, which, it will be noted, was just twice the amount of the policy liability. An appeal was taken to the Supreme Court, without giving bond, and while the appeal was being perfected the judgment plaintiff had an execution issued, which was returned *"unsatisfied, nothing found upon which to levy"*, and the plaintiff then filed suit against the Insurance Company.

Stay of execution until "final judgment" on the appeal, can be had, of course, by the defendant filing an appeal or supersedeas bond, but in this case the truck owner could not make such a bond in such an amount. How many truck operators, outside of the large "fleet" operators doing an interstate business, could?

The question, "What to do next?", therefore, is placed squarely before the Insurance Company. Three courses are open to it:

1. Make the supersedeas bond for the assured for the amount of the judgment.
2. Supersede the judgment in part, i.e., to the amount of its coverage under the policy.
3. Proceed with the appeal for the assured without supersedeas, and also defend a suit on the policy.

1. The mere statement of the first course is enough to arrive at an answer in the negative. The company would not consider enlarging its possible liability from $5,000 to $10,000, just on the chance of reversing the judgment in the lower court, no matter how optimistic it or its counsel might feel about the final judgment on appeal. The only condition upon which the Company could safely make a bond for the full amount would be adequate security or indemnity against any amount it might be called upon to pay on the bond over and above the amount of its policy liability.

2. The second proposition calls for more careful consideration. By the statutes of a great many states, and this is so in Arkansas, a judgment defendant may supersede the judgment "in part". Would the Company by making a supersedeas bond for $5,000.00, even granting that by so doing it could prevent a suit against it during the pendency of the appeal, be sure that it was not doubling its liability, and, in the event of an affirmance of the judgment by the Supreme Court, be called upon to pay $5,000.00 under the terms of its policy, and $5,000.00 upon the supersedeas bond as an independent undertaking? That such a situation might be the result of thus superseding the judgment could reasonably be anticipated when the nature of a supersedeas bond is considered. The obligation of the bond is, "to pay the judgment that may be rendered by the Court", not to pay *on* the judgment the amount of the liability under its policy. If the judgment were affirmed the company might pay the amount due by the terms of the policy, assuming that thereby it was released of all liability in the case, but its bond would still be outstanding; if it satisfied the bond it could still be held to respond under the policy.

The decision in the case of *Stapley v. U. S. Casualty Co.*, 260 N. Y. 323, 183 N. E. 512 is very much in point. In that case the plaintiff recovered a judgment for $6,500.00 for damages caused by negligence. The Company executed an appeal bond undertaking "that the appellant will pay all costs and damages which may be awarded against the appellant on appeal, not exceeding $500.00, and does *also undertake*, in the sum of $5,000.00, that if the judgment so appealed from, or any part thereof, is affirmed, or the appeal is dimissed, the appellant will pay the sum recovered, or directed to be paid by the judgment—in all not to exceed said sum of $5,000.00."

The judgment was affirmed. The Company paid the plaintiff the amount of the policy, $5,000.00, plus the costs, and then the plaintiff began action against the company

on the appeal bond for the balance of $1,500.00. The Court held the Company liable on its bond for the $1,500.00 still due on the judgment, distinguishing the undertaking from that in *Shapiro v. Equitable C. & S. Co.*, 256 N. Y. 341, 176 N. E. 416, on the theory that in the Shapiro case the appeal bond provided for payment "up to $2,500.00".

It is somewhat difficult to understand or see any difference between "not to exceed said sum", and "up to the amount mentioned." Crane, J., in a dissenting opinion, said: "A logomachist might be able to find a distinction between the two bonds, but not the ordinary insurance man. We might go the judge one better and extend the coverage to the "ordinary lawyer".

For a good annotation on the case of *Stapley v. U. S. Casualty Co.*, and a citation of cases see 87 A. L. R. 257.

Not being desirous of taking any risk of increasing possible liability against the Insurance Company which might follow if it made an appeal bond for part of the amount of the judgment, it was decided to proceed with the appeal for our assured without giving *any appeal bond* at all. This meant that the suit which had been brought against the insurance company on the policy would have to be defended.

3. *Defense of the Suit Against the Insurance Company.* Act 196 of the Acts of 1927 (Arkansas), under the provisions of which the suit is brought, is as follows:

"Section 1. On and after the passage of this act no policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or against loss or damage to property caused by horses or by any vehicles drawn, propelled or operated by any motive power, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this State by any corporation authorized to do business in this State, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, that then an action may be maintained by the injured person, *or his or her personal representative, against such corporation under the terms of the policy* for the amount of the judgment in the said action not exceeding the amount of the policy."

"Section 2. Whenever any policy of insurance shall be issued in this State indemnifying any person, firm or corporation against any actual money loss sustained by such person, firm or corporation for damages inflicted upon the property or person of another, such policy shall contain a provision that such injured person, or his or her personal representative, *shall be subrogated to the right of the assured named in such policy, and such injured person,* or his or her personal representative, whether such provision be inserted in such policy or not, may maintain a direct cause of action against the insurance company issuing such policy for the amount of the judgment rendered against such assured, not exceeding the amount of the policy."

The policy carries an "Arkansas Endorsement" embodying the terms of the act, and further

"agrees to pay any *final judgment* for personal injury, including death, resulting therefrom, and/or damages to property, other than assured, caused by any and all motor vehicles operated by the assured, pursuant to a certificate, number ----------, issued by the Corporation Commission of the State of Arkansas within the limit set forth in the Schedule shown hereon, and further agrees that upon its failure to pay any such final judgment, such judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment."

The coverage provided in the policy is:

"Bodily Injury Loss

Coverage A. To indemnify the Assured, at the time and under the conditions set out herein against any loss, not exceeding the limit of liability shown in the Declarations of this Policy, which the Assured shall become obligated to pay *by final judgment after actual trial,* or by agreement hereinafter provided *by reason of the liability imposed upon him by law* for dam-

ages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons accidentally caused and arising out of the ownership, maintenance or use of the automobile named herein."

and the policy carries the usual provision re Assistance and Co-operation:

"Assistance and Co-Operation—In the event of any accident, loss, damage, claim *or suit* and *whenever requested by this Exchange,* the Assured, his agent, employees servants or representatives shall assist in the recovery of property insured hereunder by means of replevin proceeding or otherwise, effecting settlement, securing evidence, obtaining the attendance of witnesses and *prosecuting suits to such an extent and in such manner as is deemed desirable by this Exchange,* and the failure of the Assured, his agents, employees, servants or representatives or either of them to do any of the foregoing or to comply with all of the other terms, conditions and provisions of this Policy, or leaving the scene of an accident unlawfully shall render his Policy null and void."

Act 196, *supra,* is typed after Section 109 of the Insurance Laws of New York. Many of the States have similar acts with slight variations in their terms. No attempt has been made to collate these acts of the various states, nor to note their similarities or differences.

In attacking our problem and working out the defense to the action against the insurance company, let us first analyze the act under which it is brought. As prerequisites to bringing action against the Company there must be:

1. An execution against the insured returned unsatisfied in an action brought by the injured party against the insured. (An execution necessarily implies a judgment.)
2. The action must be "under the terms of the policy, and reinforcing this provision the act further provides that the judgment plaintiff (the injured party) is "subrogated to the right of the assured named in such policy".

Undoubtedly the first pleading the Company will file will be a "Motion to Abate", and if this Motion is over-ruled by the trial Court, as it probably will be and as it was in the case being discussed the next pleading should be an Answer, not waiving the "Motion to Abate". The Answer very likely will present two defenses; first, the assured is not insolvent; and, second, the action against the Insurance Company is prematurely brought, the case against the assured not yet being reduced to a *final judgment.*

The first defense will, ordinarily, not avail much, for the return of an execution unsatisfied, is prima facie evidence of insolvency.

"A return of execution unsatisfied is accepted by the Courts as proof of insolvency —that is, insolvency so far as assets which can be reached at law are concerned" *Pomeroy,* Vol. 5, p. 5117, Sec. 2309, and cases cited.

"A judgment and execution unsatisfied are evidence of insolvency, of inability to collect." *Terry v. Tubman,* 92 U. S. 156, 23 L. Ed. 537.

This presumption, if it can be said to rank that high in the scale of evidence, being one of fact, is subject to being rebutted, but the plaintiff, having made proof of the execution returned unsatisfied, and especially under the terms of the act under consideration, has made a prima facie case, and the burden shifts to the Company to prove solvency of its assured. This is practically an impossible task for if the assured were solvent he could make his appeal bond himself or give indemnity to his insurance company in an amount to justify it in making his bond on appeal.

The issues, therefore, raised by the Complaint and Answer are narrowed down to one, viz: "the action against the insurance company is prematurely brought."

The insurance company by its policy has agreed to pay any "final judgment". What is a final judgment? The books are full of cases defining the term and holding judgments of a trial court from which an appeal will lie as being final judgments. If we are to be bound by this definition of the term, then we have a final judgment against our assured, because not only is there such a judgment, but an appeal has actually been taken to the Supreme Court, and is in process of being perfected. But as the term "final judgment" is used in the policy, is it not to be interpreted as meaning a judgment of a court of last resort? This interpretation of the term is justified by other terms of the

olicy, for instance, the wording "liability mposed upon him (the assured) by law", and he obligation of the assured, whenever requested by the company to assist in prosecuting suits "to such an extent and in such manner as is deemed desirable by the company". Certainly it was never intended by the insurance company that it would be bound to pay any judgment which might be rendered against its assured at the end of a trial by a trial court without the benefit of an appeal to the superior or appellate courts.

In the case of *General Accident Fire & Life Assurance Corp. v. Clark,* 34 F. (2d) 33, the Court held:

> "There is no doubt that the judgment of the superior court in a damage case is the final judgment in a technical sense, and it is so designated by the statutes of Arizona concerning appeals. This is true, whether or not an appeal is taken, and whether or not a staybond is given. It is thus designated to distinguish it from an interlocutory decree or order. It is equally clear that it is not 'final' in the sense of concluding the litigation, or finally establishing the rights of the parties, where an appeal is pending. This distinction between a strictly technical definition of the word 'final' as applied to a judgment and the popular sense of the terms is recognized in the decision construing a policy similar to the one at bar."

The term "final judgment" has two significations, one which in a strict legal sense is its true meaning, viz. a determination of the rights of the parties after a trial, whether such is the subject of review, or not; and the other, which is the colloquial use or signification which makes it synonymous with determinative, or a judgment that cannot be appealed from, and which is perfectly conclusive upon the matter adjudicated.

Dean v. Marshall, 90 Hun. 335, 35 NYS. 724.

In the case of *Langley v. Zurich General Accident & Liability Insurance Co.,* 97 Cal. (App.) 434, 275 Pac. 963, the Court holds that as a basis for bringing an action against the insurer, the judgment obtained against the assured becomes a final judgment upon expiration of the time for appeal, where at that time no appeal has been taken and no motion has been made to set aside the judgment. In the case of *Jennings v. Ward,* 114 Cal. (App.) 536, 300 Pac. 129, the Court held that a judgment in favor of an injured person against the assured from which an appeal was pending was not final within the provisions of the policy; that no action shall lie against the insurer unless brought after the amount of the claim or loss shall have been fixed either by final judgment or agreement, and the Court further said there was nothing inconsistent between that provision and the further provision that the judgment creditor might have a right of action against the insurer, subject to the terms and limitations of the policy, if execution on a judgment against the assured is returned unsatisfied.

In Louisiana and Alabama, and probably in New York, the judgment plaintiff, under the decisions in those states, has the right to bring an action against the insurance company on the policy after judgment against the assured and an execution upon the judgment returned nulla bona, even though an appeal from the judgment against the assured is pending. See *Edward v. Fidelity & C. Co.,* 11 La. App. 176, 123 Sou. 162; *Federal Auto Ins. Co. v. Abrams,* 217 Ala. 539, 117 Sou. 85; *Materazzi v. Commercial Cas. Ins. Co.,* 283 NYS. 942, 83 A. L. R. 758, 85 A. L. R. 51-53.

The New York Court in the case of *Shroeder v. Columbia Cas. Co.,* 213 NYS 649, gives the best reasoned opinion that we have been able to find, although the later case, *Materazzi v. Commercial Cas. Ins. Co., supra,* is directly opposite in his holding. In the Shroeder case the Columbia Casualty Co. had issued its policy to the Aberdeen Hotel Co. with limits of five and ten. Plaintiff's intestate died from injuries received while working for the hotel, and the plaintiff secured judgment against the assured for $7,000.00 and costs. An appeal was taken without bond, and during the pendency of an appeal the plaintiff issued execution, which was returned unsatisfied, and then plaintiff brought the suit against the insurance company under Section 109 of the Insurance Laws of New York. The company defended this suit under the terms of its policy "to indemnify the assured against loss by reason of a liability imposed by law." The Court said:

> "The gist of the defense interposed by the defendant is that an appeal has been taken from the judgment which is still undetermined; that such an appeal is being prosecuted diligently and that 'liability imposed by law' will not become fixed until

termination of such appeal. It contains no allegations that execution had not been returned unsatisfied, or that the judgment debtor is solvent. On the contrary, I am satisfied, from the proof submitted by the plaintiff, that the insolvency of the judgment debtor has been established, and that the return of execution unsatisfied was by reason of such insolvency. It further appears without dispute, that the defendant has filed no bond to stay execution, but has otherwise perfected the appeal. In these circumstances, the plaintiff argues that she has established her right to maintain this action, that the defense interposed is without merit, and that the defendant's liability at this time is fully established.

"With this contention of the plaintiff I cannot agree. Under the policy the assured was required to cooperate with the company in the defense of the action and in any appeal. In such circumstances the insured, had it been solvent would not, I think, be permitted to refuse to cooperate in the appeal, but instead pay the judgment and bring action at this time against the defendant. In the circumstances I do not see how the plaintiff in this action can claim greater rights than the assured would have. (Citing cases). On the appeal the judgment now sought to be enforced may be reversed. If such were the outcome of the appeal, the defendant might find itself without recourse against a plaintiff financially irresponsible.

"My conclusion is that the liability 'imposed by law', provided for in the policy, has not yet been fixed, and will not be so fixed until all appeals the defendant sees fit to take have been fully determined".

Perhaps it is because we are insurance-minded, but we can't help but think that the decision in the Shroeder case is much better reasoned and more equitable and just, not only to the judgment plaintiff, but to the insurance company, than the decision in the case of *Materazzi v. Com. Cas. Ins. Co.*, in which latter case the Court sustains the right of the plaintiff, under the provisions of Section 109 of the Insurance Laws of New York, as added by laws of 1917, C. 524, as amended by Laws of 1924, C. 639, to bring the action against the insurance company while an appeal is pending, and before a final determination of the merits of the case on appeal.

In the case of Mrs. Walter Brown, sometimes known as *Patricia LaMont, v. American Fid. & Cas. Co.*, the Court of Comm Pleas, of Baltimore, Md. in a very well re soned opinion interprets the term "final jud ment" and follows the decision in the case *Shroeder v. Columbia Cas. Co., supra*, a enters judgment in favor of the insura company, "without prejudice to the right the plaintiff to bring a new action upon th affirmance by the court of appeals of th judgment in favor of the plaintiff against th assured". The decision was based solely upo the determination that the action against th insurance company was prematurely brough and was not to be considered as a final de termination of the merits. The decision i this case may be found printed in the Dail Record, Baltimore, Tuesday, October 8, 193

In the search of Arkansas cases to sustai our position that the suit against the insuranc company was prematurely brought, one cas was found, viz.; *Fidelity & Casualty Co. v. Fordyce*, 64 Ark. 174. In that case tw judgments had been obtained by two differ ent parties against the assured, Street Rail way Company, and appeals had been taken to the Supreme Court of the State, without supersedeas. During the pendency of the ap peals suit was brought by the judgment plaintiffs against the insurance company The Court held that:

> "Until the termination of the litigation both parties to the policy deny the liability of the assured, and the existence and extent thereof remain undetermined according to the method by which the parties, in effect, agree it should be ascertained and fixed. Any other interpretation of the policy would take from the insurer the protection for which it contracted.
>
> * * * "In short, our conclusion in this case is that, when the amount of the li ability of the railway company for dam ages in consequence of bodily injuries caused by the operation of its railway was determined, the Fidelity & Casualty Com pany became bound by its policy to pay so much thereof as does not exceed the sum it agreed to pay in such cases, although it was not paid by the assured *(American Employers' Liability Insurance Company v. Fordyce*, 62 Ark. 562), but that the same was not determined so long as the action therefor was pending in court, or an appeal from the judgment thereon was pending in the supreme court."

The judgment of the Supreme Court in this case was to the effect that the cases against

the insurance company based upon the judgments which were on appeal, and which appeal had not yet been decided, were dismissed without prejudice.

It was thought that the decision in the *Fidelity & Cas. Co. v. Fordyce* would be determinative of the question involved, viz: that the present suit against the insurance company was prematurely brought, but it was argued by the judgment plaintiff that this case was decided before the passage of Act 196, and the Court adopted the theory of counsel for the judgment plaintiff that Act 196 gives to the injured party the right to sue the insurance company immediately upon return of an execution unsatisfied, that the use of the little word "then", an adverb of time, meant that the right of action against the insurance company accrued immediately, and the rest of the Act, including Section 2, which it will be noted merely subrogates the injured party to the rights of the assured, goes for naught. The trial court, therefore, denied the Motion to Abate, denied the Motion to Dismiss, and entered judgment against the insurance company for the full amount of its coverage, to-wit: $5,000.00, from which judgment an appeal was taken, and that appeal to the Supreme Court of the State of Arkansas is now being perfected. Whether or not the Supreme Court will get to pass upon this question in this case is somewhat doubtful, because the appeal in the case of our assured from the judgment in favor of the injured party will be heard and determined before the appeal on behalf of the insurance company is even lodged in the Supreme Court, and if the assured's appeal is decided in favor of the assured, the Supreme Court will very likely reverse the judgment against the insurance company, without deciding the question as to the bringing of the suit prematurely, but if on the other hand the appeal in the case of the assured is decided against the assured, the insurance company will pay the amount of its coverage, and not prosecute its appeal.

As stated in our first paragraph, we have merely tried to think our way through a very difficult situation, making no claim that we have exhausted all of the authorities, but we hope that this paper may prove helpful to those attorneys who may be faced with a situation similar to that which confronted us in the case under discussion.

The Ability of Sureties to Control Payments Due Under Government Contracts

By Thomas F. Mount
Philadelphia, Pennsylvania

It has long been recognized that sureties on government contracts have certain equitable rights. Many of the decisions are not clear as to the exact legal or equitable principles on which they rest nor have various equitable doctrines been consistently applied.

The Supreme Court in the recent case of *Martin v. National Surety Company*, 300 U. S. 588, 598, intimates that there is considerable confusion regarding the surety's equitable rights. No attempt is here made to dispel the confusion but rather to point out the fact that a surety may invoke the aid of equity to recoup or prevent a threatened loss due to the actual or anticipated default of its principal.

The surety's right to obtain possession or control the application of the payments due under a government contract has been upheld in varying circumstances upon the equitable principles of subrogation, exoneration and equitable assignments.

The well known case of *Prairie State Bank v. United States*, 164 U. S. 227, holds that the surety completing a defaulted contract of its principal had an equitable lien on the retained percentage due by the government superior to that of a bank which during the progress of the work had loaned money to the principal secured by an assignment from him of the retained percentage due under the contract.

As we understand that case, its decision rests upon the equitable doctrine of pure subrogation whereby the surety succeeded to the rights of the government.

In the case of *Henningsen v. U. S. Fidelity & Guaranty Co.*, 208 U. S. 404, the contractor completed the work but failed to pay labor and materialmen required by the contract. The surety paid the labor and materialmen and it was held that its right to the proceeds of the contract was paramount to that of one who had loaned money to

the contractor taking an assignment of the amount due under the contract. The apparent basis of the decision was that the surety was subrogated to the right of the contractor to receive the proceeds of the contract, and that its equity attached when it became surety. The court also observed that by paying the materialmen, the surety released the contractor "and to the same extent released the government from all equitable obligations to see that the laborers and supply men were paid". It is interesting to note that the court in that case does not discuss the source of the equitable obligation on the part of the United States to see that labor and materialmen are paid.

These two cases have been cited and discussed many times and stand as authority for the proposition that where the surety fully completes and fully indemnifies all persons who are protected by its bond it succeeds to their rights by way of subrogation.

Therefore, it will be seen that the surety is subrogated to the retained percentage where the contest is not between it and the parties who are to be benefited by its bond.

Apparently some doubt has been entertained as to whether the surety's right of subrogation extended to all payments due under the contract or only to the retained percentage. It has been recently held that where a surety is entitled to subrogation, its right extends to progress payments as well as the retained percentage. See *Lacy v. Maryland Casualty Co.*, 32 F (2d) 48. In *Martin v. National Surety Co., supra,* the court compelled the proper application of a progress payment.

In *American Surety Co. v. Westinghouse Electric Manufacturing Co.*, 296 U. S. 133, the contractor fully completed the work but did not pay labor and materialmen. The surety paid into court the full penalty of its bond which was distributed pro rata among unpaid labor and materialmen, being insufficient to pay their claims in full. In that case the court held that the surety was not subrogated to the retained percentage nor could it share the same with the unpaid materialmen. The whole amount of the retained percentage, there being no other creditors, was awarded for distribution among the materialmen.

In this case the court seemed to recognize a paramount equity in favor of the materialmen.

On the authority of *Jenkins v. National Surety Co.*, 277 U. S. 258, it was held that the surety could not share in an insolv estate at the expense of the creditor entit to the protection of its bond.

In all of the foregoing cases, the surety w attempting to obtain for itself the proce of the contract in order to avoid or to redu its loss.

Situations may frequently arise where th contractor threatens to dissipate or to refu to apply the proceeds of a contract to th payment of labor and material incorporate therein. When such condition is apparent i may be that the surety, although obligated has paid nothing and consequently is not i a position to attempt to enforce subrogation.

In the case of *Morley v. Maryland Casualty Co.*, 300 U. S. 185 and 90 F (2d) 976, th court entered a decree preventing an insolvent principal from diverting the proceeds of the contract. In that case the contractor encountered financial difficulties and an agreement was made whereby it and the surety agreed to deposit certain monies in a joint account and the contractor also agreed that all future payments received from the government would be deposited in said account and disbursed under joint control. By direction of the contractor, the checks were to be forwarded to the bank which held a power of attorney to cash the same. The procedure was followed for a while but through inadvertence, the government forwarded a check directly to the contractor who deposited same in his own bank. The collection of the check was enjoined and a bill was filed asking for specific performance of the agreement. The trial court held that aside from the agreement to deposit the monies, the contractor was under a duty to exonerate the surety from the liabilities incident to the contract. After the case was reviewed by the Supreme Court, apparently the bill was amended so as to allege that the contractor intended to convert the proceeds of the contract and that the surety would suffer irreparable loss unless the monies were impressed with a trust for the purpose of paying the contractor's obligations incurred in connection with the contract. On the second appeal, the Circuit Court of Appeals affirmed the decision of the lower court and held that the surety was entitled to exoneration, and that the bill should be treated as in the nature of a bill quia timet. It is not clear from the decision whether the Circuit Court of Appeals on the second appeal made its decision on the strength of the amended bill alleging a threatened conversion of the funds by the

principal. The Supreme Court, when it reviewed the case, held that an action for exoneration did not include among its elements the presence of a wrongful purpose.

None of the courts in considering this case specifically holds that the payments under the government contract are trust funds, but the decision of the Circuit Court of Appeals clearly indicates that the surety may prevent the threatened improper conversion of the proceeds of a contract and require that the same be made available to discharge the claims for labor and materials.

In the case of *Martin v. National Surety Co.*, 300 U. S. 588, the contractor at the time of applying for the bond convenanted that he would not assign the proceeds of the contract and specifically assigned to the surety all payments to become due under the contract. The contractor experienced financial difficulties and borrowed $10,000 from a third party who had knowledge of the assignment to the surety. The surety company demanded that the contractor direct the government to send all future payments to it and that he execute a power of attorney in its favor. This he failed to do but did execute such papers in favor of his creditor who by means thereof obtained a progress payment then due from the government and deposited it in his own bank and credited it against the loan of the contractor. Upon learning of this situation, the surety filed a bill against the creditor and the contractor and prayed that the monies be impounded and paid into court, and that same be applied to labor and material claims and in exoneration of its liability therefor under the bond. The contractor was insolvent. The surety later became insolvent and renounced its rights in favor of materialmen.

The Circuit Court of Appeals held that the proceeds of the contract were charged with an equitable lien in favor of materialmen and ordered the fund distributed among them.

In that case it was contended that the assignment of the application to the assured was invalid by reason of section 3477 R. S.; 31 U. S. C., Section 203. The Circuit Court of Appeals indicated that while that assignment might be legally inoperative yet it was sufficient to create an equitable lien when the subject matter of the assignment had been reduced to possession and in the hands of the assignor or persons claiming under him with notice.

In this case the surety by reason of its insolvency dropped out of the case and renounced its rights, if any it had, to the fund in favor of material men. The obvious purpose of the proceeding was to make the monies available for the payment of labor and material bills. It would seem that the Supreme Court accomplished this by the recognition of an equitable lien in favor of the surety by virtue of the assignment by the contractor which was legally invalid, rather than by holding that in the circumstances the labor and materialmen had an independent equity of their own, as might be inferred from the case of *American Surety Co. v. Westinghouse Electric Co. supra.*

The court indicated that the same result might be reached on other grounds without stating what they might be.

Thus, it will be seen that at various stages in the performance of a government contract the surety in appropriate circumstances may prevent the improper use by the contractor of the proceeds of the contract. It would seem that the surety in order to accomplish this may proceed in its own right to secure exoneration and in behalf of unpaid materialmen for the protection of their equitable rights. See *Martin v. National Surety Co.*

To what extent the payments under a government contract may be considered trust funds or how far they may be followed cannot be satisfactorily determined at this time from the decided cases. However, in view of the liberal tendencies indicated in the above decisions the contention well may be made that the payments due under a government contract are generally to be considered as impressed with a trust to the extent necessary to protect the surety and unpaid materialmen in circumstances where the contractor or his assigns attempt to apply them to uses not connected with the contract.

Where a contractor who is in default pays part of the proceeds to a creditor not connected with the particular contract and such creditor is without knowledge as to the source of the funds, but has not given up security or changed his position by receiving the payment, may the unpaid materialmen or the surety require repayment by such creditor? This is one of many interesting questions which has been raised in this connection but not yet satisfactorily answered. In most of the cases the funds were brought under control by legal process.

It may be that where the contractor is an

insolvent corporation and uses payments from the contract to discharge its general indebtedness or in so doing creates a preference, the effect of the corporation laws of some states, similar to those of New Jersey, may have a decided bearing upon the ability of the surety to require the repayment of such monies by the creditor receiving same.

As stated at the outset this is not an attempt to analyze and measure the equitable rights and remedies of the surety, but rather to call attention to the results of the recent cases, with some slight personal observations and expression of doubt.

What Constitutes the Practice of Law?

By Raymond N. Caverly*
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IT will be our purpose to limit our consideration of this subject to the relationship between the practice of law and the routine activities of casualty insurance carriers in connection with the disposition of claims by salaried employees. This relationship during the past few years, as is well known, has become highly controversial. The controversy reached a new state in the recent decision of Judge Dinwiddie of the Circuit Court of Boone County, Missouri, in an action between a group of six mutual casualty insurance companies together with their lay claim employees and the Bar Committee of Missouri.

Judge Dinwiddie in his opinion in this case holds that the following acts constitute the unauthorized practice of law and by his decision enjoins and restrains both the Insurance Companies and the lay claim representatives involved from performing these acts:

> "First: The adjustment and settlement of claims against said companies' insured; and negotiations with the claimants in respect thereto;
>
> Second: Selection and preparation of releases, convenants not to sue, and contracts or agreements for the settlement or compromise of claims against the companies' insured;
>
> Third: Advising said companies or their insured of their, or his legal rights;
>
> Fourth: Appearances before the Workmen's Compensation Commission of Missouri, together with the presentation of legal rights or others therein, at formal, or informal hearings before said Commission, or one of said Commission;
>
> Fifth: Determination of whether or not said companies' particular insurance contract covers a particular casualty of their insured;
>
> Sixth: Determination of legal liability and the extent and nature thereof, for said company or the insured or both."

Judge Dinwiddie further holds that the following acts do not constitute the practice of law and may properly be performed by a layman:

> "1. Detection, (a) discovering of witnesses and evidence; (b) taking photographs; (c) statements of witnesses; and acts of like nature.
>
> 2. Appraisement of damage to physical property where liability is undisputed.
>
> 3. Procuring execution of prepared instruments, where the lay employee exercises no discretion in the selection or preparation; and payment by delivery of check, draft or payment of money in discharge of claims.
>
> 4. Determination of or recommendation of amount to be set up as a reserve in various claims."

By consent of the parties two advisory judges sat with Judge Dinwiddie during the proceeding and one of these, Judge Dearing, has written a dissenting opinion which is in complete disagreement with Judge Dinwiddie. An appeal has been taken from Judge Dinwiddie's decision and this appeal is now pending in the Supreme Court of Missouri.

Notwithstanding all of the discussion which has taken place concerning this subject and all of the agitation which has been created by various Bar Associations this is the first time any court has spoken with relation to the subject in categorical fashion, or indeed in relation to any one of the activities of the regularly employed salaried claim representatives.

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The questions involved are obviously of major importance to the large number of laymen engaged in claim work whose livelihood would be destroyed under Judge Dinwiddie's theory and to the interests employing them. The importance to the legal profession is apparent. The interest of both laymen and lawyers is necessarily selfish to some degree which is unfortunate inasmuch as it may tend to cause both to allow their own interest to out-weigh the interest of the public which should be paramount.

It would be a matter of grave concern to the public if through the whims of courts the legal profession was allowed to encroach upon activities of business which have not belonged to it in the past. Such encroachment would undoubtedly be expensive to business and indirectly to the public. Perhaps, likewise, the legalistic attitude usually assumed by lawyers would not be to the advantage of the members of the public who might be involved. On the other hand the public is entitled to have claims handled under some plan which will furnish an assurance of fair dealing on the part of the claim adjuster. It will be apparent that there is a practical aspect as well as a legal one to our problem.

Control of the practice of law in most of the states is concededly a judicial rather than a legislative function.[1] It is true that there are statutes in many states making the practice of law without a license a public offense but it has been determined in most states where such statutes exist that the determination of what is or is not the practice of law is for the courts and not for the legislature. Certainly it is true that Bar Associations, whether local, state or national, are without authority to define the boundaries which must be observed by persons who are not admitted to practice. The report of the Committee on the Unauthorized Practice of Law of the American Bar Association, made at the 1932 annual meeting, contains the following statement:

> "Neither a Bar Association nor a corporation has any authority to declare what is or what is not the practice of law. Only the State, through its proper tribunal, may decide such a question."

No one will question the fact that control of the right to engage in the practices properly belonging to the legal profession is necessary both in the interests of the public and the legal profession. The necessity for standards of learning and skill and, likewise, of moral character is apparent. More important still is the necessity for continuously maintaining an appropriate standard of ethics. These considerations, however, do not make it necessary that lawyers be given a monopoly of all the activities of life in which standards of this sort are important. The real problem and the only point worthy of serious consideration does not involve a question as to whether or not a layman should be permitted to indulge in practices or duties which constitute the practice of law, but rather a determination of the borderline separating activities which belong to the legal profession from those which do not.

It is a curious thing that there does not seem to be anywhere in the decisions a completely satisfactory and all-inclusive definition of the practice of law. As a matter of fact it has been stated by the courts on frequent occasions that no all-inclusive definition of the practice of law can be given.[2] Judge McAfee, one of the advisory judges in the Missouri case, in an opinion expressing agreement with Judge Dinwiddie's conclusion, summarizes the conculsions expressed in the decision in excellent fashion:

> "The terms 'practice of law' and 'law business' do not permit of accurate definition. The degree of legal knowledge and training required for different tasks varies so greatly and the variety of circumstances under which such tasks are undertaken is so broad that many of them are left in the hazy borderland between what does and what does not come within those terms."

[1] In re Lavine, 2 Cal. (2nd) 324, 41 P. (2nd) 161 (1935); People v. People's Stock Yards Bank, 344 Ill. 462, 176 N. E. 901 (1931); State ex rel. Chicago Bar Assn. v. Goodman, 8 N. E. (New Series) 941 Ill. (1937); In re Opinion of the Justices, 289 Mass. 607, 194 N. E. 313 (1935); Richmond Assn. of Credit Men v. Bar Assn. of City of Richmond, 189 S. E. 153 (Va. Sup. Ct. App. 1937); State v. Cannon, 206 Wis. 374, 240 N. W. 441 (1932); Rhode Island Bar Assn. v. Automobile Service Assn. 179 Atl. 139 (R. I. 1935); See also Annotation: Power of Legislature Respecting Admission to Bar (1930) 66 A. L. R. 1512, (1932); 81 A. L. R. 1064, and cases cited.

[2] Clark v. Austin, 101 S. W. (2nd) 977, 985 (Mo. 1937); State ex rel, Wright v. Barlow, 131 Neb. 294, 268 N. W. 95; The Pa. S. C. in the recent case of Shortz representing the Wilkes-Barre Law and Library Association v. Ambrose E. Farrell, decided 6/25/37, still unreported.

The Supreme Court of the United States, however, has defined "attorneys-at-law" in a very simple and what would appear to be a common sense way. This definition is as follows: "Persons acting professionally in legal formalities, negotiations or proceedings, by the warrant of authority of their clients may be regarded as attorneys-at-law within the usual meaning of that designation."[3] If we are to approach the problem from the point of view of legal precedent a careful search of the decisions does not disclose any better grade standard for determining the borderline before referred to.

Let us consider the usual routine which is followed by the regularly employed full-time salaried claim representatives of casualty insurance carriers in so-called third party claims, that is, claims where the insurer is directly responsible to the claimant but where technically the claim is against the company's insured. An automobile accident involving personal injury to someone other than the insured under a contract covering the insured's legal liability for damages is perhaps a typical example of such a claim. The ordinary routine is for the first report of such an accident to come to the Company Claim Department in the community in which the insured lives, either directly from the insured or through the insured's broker or agent. There are five major steps which may be taken in the Claim Department in such a case. They are as follows:

1. Determination of whether or not the company has a policy in force covering the situation.
2. If the first question is determined in the affirmative, the collection of the facts with reference to the accident.
3. Determination of whether or not a settlement should be effected.
4. If this is determined in the affirmative, negotiations leading up to settlement and consummation of the settlement.
5. Securing of a release on a form provided by the Company.

It is true there may be variations of this procedure in the unusual situation, but the almost invariable rule is that where the situation is so unusual as to require deviation from the usual routine the entire situation is, and should be, laid before the main office of the insurance carrier, usually in some distant city, and the legal staff of the main office directs future action. It is sufficient for our purposes, therefore, to consider the routine in the usual rather than the unusual case.

Reverting to the definition of "attorneys-at-law" by the Supreme Court of the United States previously quoted, the essential part of the definition would seem to be "acting professionally in legal formalities, negotiations, or proceedings." Tested by this definition, do the routine acts, or any of them described above, constitute the practice of law?

In the first place it would not seem that a layman would be considered to be acting professionally unless he held himself out as acting as a lawyer. Certainly it must be conceded that the lay salaried claim representative does not do this in ordinary practice. There is not, and never has been any pretense on his part, insofar as the writer's observation goes, that he is a lawyer or that he is entitled to practice law. It is usual and customary for him to represent himself as exactly what he is, a layman trained through experience in a certain line of work, which work he, at least, does not consider to be the practice of law.

However, whether this be true or not, let us consider whether or not he acts "in legal formalities, negotiations or proceedings" as used in the Supreme Court's decision, in the performance of his usual routine.

First is the determination of coverage. Is this, as ordinarily accomplished in a claim department, a "legal formality, negotiation or proceeding?" We can perhaps eliminate "negotiation" and "proceeding" for if it falls under any one of the three heads the first, "legal formality", would seem to be the only possible place for it. What is a legal formality? It would seem that a better definition could not be evolved than a formality ordinarily engaged in or handled by a lawyer. True, it is customary to engage lawyers to interpret contracts where the meaning of the contract is obscure, or where legal precedent may be important in determining the true meaning or effect. It is respectfully submitted that the claim man does not interpret contracts in this sense. What does he do in determining coverage? He secures, of course, the company's copy of the policy. This covers an individual, a partnership or a corporation for a stated period and refers to the automobiles intended to be covered by motor or serial number. He determines the identity of the insured as the same individual, partner-

[3]National Savings Bank v. Ward, 100 U. S. 195—25 Law Ed. 621.

ship or corporation described in the contract, he compares the engine or serial number of the car with the car described and he matches up the date of the accident against the policy period.

True it is that the automobile liability policy has certain exclusions which may raise questions of coverage. These exclusions in general are as follows:

The policy does not cover

1. While the automobile is being used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying persons for a consideration, or while rented to others;
2. While the automobile is used for the towing of a trailer;
3. While the automobile is operated by a person under the age of fourteen years, or by any person in violation of a state statute regulating the age of drivers;
4. Where there is a change in title of the automobile without the consent of the company;
5. Where injury or death is caused to an employee of the assured, other than a domestic service, while engaged in assured's business;
6. Under the property damage provision where property damaged is owned by, or in charge of the insured.

Legal questions may arise under these exclusions and if so they should be determined by a lawyer, but it is submitted that the ordinary matching up of the facts disclosed by the investigation with the policy details before referred to, or with these exclusions, does not ordinarily involve legal questions and is not the sort of thing which is ordinarily done by a lawyer. It involves the application of common sense primarily, and is analogous to the transactions which are handled by laymen in other types of business daily without any thought of connecting the transactions with the practice of law. In the last analysis how does it differ in quality from the act of the agent or underwriter when he prepares the policy for delivery and explains its conditions to the insured, or interpretation of a railroad ticket by a train conductor? Certainly the completion of an income tax return for a corporation by the accountants in the corporation's accounting department is far more involved.

The second of the five activities in connection with claims, that is, the investigation of facts, is so obviously not a "legal formality, negotiation or proceeding" that argument would seem to be unnecessary. It is to be recalled that Judge Dinwiddie in the Missouri decision classified this as a proper activity for a layman.

The third activity, that is, the determination of whether or not a settlement is to be effected, has probably caused more controversy than any of the others. It has been argued that this involves the determination of legal responsibility. Perhaps this would be true if the claim man, after weighing all of the facts, reached a conclusion involving the fine distinction of the law of negligence. As a practical matter, however, the claim man does not do this. If there are questions of that sort to be determined, his employer, in the interests of selfprotection, requires him to seek the opinion of counsel or has the problem involved determined by counsel in the employer's main office. What the claim man does is to determine from his experience the expedient thing to do—not from the legal point of view, but from the practical point of view. He knows from his experience whether or not a settlement is expedient and, likewise, about how much he ought to pay on behalf of his employer. He does exactly the same thing on behalf of his employer that lay employees in many types of business do in regular routine. The complaint clerk in a department store is constantly engaged in making adjustments with customers not based upon the application of legal principles in the same sense that it is customary for a lawyer to apply them, but based on business usages and customs. It would obviously be absurd to say that he was practicing law.

What about the negotiations of a settlement? Is this a "legal formality or negotiation?" The usual method of making a settlement does not differ very much from the traditional method of making a horse trade inasmuch as there is no slide rule by which the exact value of a claim can be determined. This may seem like a harsh statement to make with respect to a situation where injury to person is involved, but it seems to me to describe the process usually employed whether the negotiators be lawyers or laymen. The same process is followed in business dealings of many types where there is no thought of employing lawyers as negotiators. What then is there about personal injury claims that makes the negotiation of settlements a "legal

formality or negotiation?" Certainly not custom, for the custom has been quite the reverse. Lawyers have not been customarily employed until the interested parties or their representatives have found that they could not agree except, perchance, where certain types of lawyers have injected themselves into the cases on behalf of the claimant for the primary purpose of sharing in the spoils.

The last step, that is, the procuring of a release after settlement has been agreed on is such a simple matter of routine in the ordinary case that it would seem to be possible for a clerk or a competent stenographer to handle it just as effectively as a lawyer from the employer's point of view. The form is ordinarily provided by the employer and all that is involved is the filling in of proper names and dates in blank spaces. Certainly this does not differ in principle from the preparation of installment contracts for the sale of merchandise or the procedure followed in a bank when a note form is filled in and the signature procured from the borrower by the loan clerk. It is true there is a legal document involved, but the printed form which contains the essentials of the contract has been prepared by a lawyer and it seems far fetched indeed to contend that the act of filling in the blank spaces and the act of procuring the signature are "legal formalities."

In our consideration of this subject we have emphasized custom. It has been appropriately said by the courts that the practice of law is a privilege and not a right and that the privilege of practicing law cannot be acquired by prescription. This does not mean that the courts cannot look to custom or usage in determining what is or is not the practice of law. As a matter of fact, in the absence of precedent in court decisions how else is a court to find the borderline? The law of customs and usages is well defined as applied to many types of situations and it is well established that long continued practices and general public understanding are binding on the courts of law.

It is beyond dispute that ever since casualty insurance was first written in the country, approximately sixty years ago, the general routine work of handling claims from the determination of coverage to the taking of releases has been done very largely by laymen. There are today thousands of laymen serving their employers satisfactorily in this work, laymen who embarked upon it years ago when they and everyone else, as far as they knew, believed it was proper and legal for them to engage in it. This has been well known to lawyers, courts and the public. The absence of court decisions involving the relationship between this work and the practice of law through all these years is the best evidence that lawyers and courts, as well as the general public, have continuously considered up to the last few years that this work did not involve "legal formalities, negotiations or proceedings." It is indeed impossible to find anywhere, whether in bar association reports, law publications, insurance publications or in the general press, any suggestion prior to the beginning of the recent depression, that the routine work of the salaried lay adjuster was an infringement upon the prerogatives of the legal profession.

That abuses occur in connection with the activities of the lay claim man cannot be denied. Will anyone contend that they do not occur in connection with the practice of law? The business of insurance is closely related to the public welfare as are many other businesses and it is unquestionably in the public interest that the conduct and standards of ethics of the claim adjuster be maintained on a plane sufficiently high to assure the public fair dealing. There are many ways in which this can be accomplished without turning over the business of claim adjusting to the legal profession—perhaps even accomplished in a better way. The legal profession and the courts together have not made a notable success of maintaining public confidence in the profession, notwithstanding the Canons of Ethics. Insurance companies in all their operations are under the very close supervision and scrutiny of the State Insurance Departments, most of which, under existing laws, have sufficiently broad power to impose discipline for any act contrary to the public interest. Furthermore, they customarily impose it in a more speedy and drastic way than do courts and bar associations in disciplining erring members of the bar. If this is not deemed to be sufficient would not a licensing system accomplish the purpose?

As lawyers let us defend the rightful prerogatives of the legal profession with all the force we have, but let us not be misled by those who, for their own selfish purposes even though under the guise of public service, are attempting to add to those prerogatives activities which traditionally and by all the rules of common sense do not belong to the profession.